Iowa Attorney General Ethics CLE

Applying the Rules of Professional Conduct to the Attorney General's Constitutional and Statutory Roles in State Government
March 22, 2016, 9:30 – 11:30
Utilities Building Hearing Room

A. Overview of Constitutional and Statutory Roles of Attorney General [Rules of Professional Conduct, Preamble, Section 18]

Attorney General Thomas J. Miller, Eric Tabor, Chief Deputy

B. Applying Rules of Professional Conduct when Representing and Defending the State, State Agencies, and State Officials.

Solicitor General Jeffrey Thompson

C. Attorney General's Conflict Committee and Policy, Handling Conflicts of Interest, and Applying Special Imputation/Screening Rules

Kevin Cmelik, Director, Criminal Appeals Division
Diane Stahle, Director, Regents and Human Services Division
Pam Griebel, Director, Licensing and Administrative Law Division
AAG Mike Bennett, PATC, Conflict Committee Counsel

Application for 2 hours ethics CLE credit approved: Activity # 218599

Iowa Constitution

Attorney general. The general assembly shall provide, by law, for the election of an attorney general by the people, whose term of office shall be four years, and until his successor is elected and qualifies. Iowa Const. art. V, § 12.

Excerpts from Iowa Code chapter 13

13.2 Duties.

1. It shall be the duty of the attorney general, except as otherwise provided by law to:

a. Prosecute and defend all causes in the appellate courts in which the state is a party or interested.

b. Prosecute and defend in any other court or tribunal, all actions and proceedings, civil or criminal, in which the state may be a party or interested, when, in the attorney general's judgment, the interest of the state requires such action, or when requested to do so by the governor, executive council, or general assembly.

c. Prosecute and defend all actions and proceedings brought by or against any state officer in the officer's official capacity.

d. Prosecute and defend all actions and proceedings brought by or against any employee of a judicial district department of correctional services in the performance of an assessment of risk.

e. Give an opinion in writing, when requested, upon all questions of law submitted by the general assembly or by either house thereof, or by any state officer, elective or appointive. Questions submitted by state officers must be of a public nature and relate to the duties of such officer.

f. Prepare drafts for contracts, forms, and other writings which may be required for the use of the state.

g. Report to the governor, at the time provided by law, the condition of the attorney general's office, opinions rendered, and business transacted of public interest.

h. Supervise county attorneys in all matters pertaining to the duties of their offices, and from time to time to require of them reports as to the condition of public business entrusted to their charge.

i. Promptly account, to the treasurer of state, for all state funds received by the attorney general.

j. Keep in proper books a record of all official opinions, and a register of all actions, prosecuted and defended by the attorney general, and of all proceedings had in relation thereto, which books shall be delivered to the attorney general's successor.

k. Perform all other duties required by law.

. . . .

13.3 Disqualification — substitute.

1. If, for any reason, the attorney general is disqualified from appearing in any action or proceeding, the executive council shall authorize the appointment of a suitable person for that purpose. There is appropriated from moneys in the general fund not otherwise appropriated an amount necessary to pay the reasonable expense for the person appointed.

The department involved in the action or proceeding shall be requested to recommend a suitable person to represent the department and when the executive council concurs in the recommendation, the person recommended shall be appointed.

2. If the governor or a department is represented by an attorney other than the attorney general in a court proceeding as provided in this section, at the conclusion of the court proceedings, the court shall review the fees charged to the state to determine if the fees are fair and reasonable. The executive council shall not authorize reimbursement of attorney fees in excess of those determined by the court to be fair and reasonable.

13.7 Special counsel.

1. Compensation shall not be allowed to any person for services as an attorney or counselor to an executive department of the state government, or the head of an executive department of state government, or to a state board or commission. However, the executive council may authorize employment of legal assistance, at a reasonable compensation, in a pending action or proceeding to protect the interests of the state, but only upon a sufficient showing, in writing, made by the

attorney general, that the department of justice cannot for reasons stated by the attorney general perform the service. The reasons and action of the council shall be entered upon its records. If the attorney general determines that the department of justice cannot perform legal service in an action or proceeding, the executive council shall request the department involved in the action or proceeding to recommend legal counsel to represent the department. If the attorney general concurs with the department that the person recommended is qualified and suitable to represent the department, the person recommended shall be employed. If the attorney general does not concur in the recommendation, the department shall submit a new recommendation. This subsection does not affect the general counsel for the utilities board of the department of commerce, the legal counsel of the department of workforce development, or the general counsel for the property assessment appeal board.

2. The executive branch and the attorney general shall also comply with chapter 23B when retaining legal counsel on a contingency fee basis under this section, as appropriate.

Iowa Code § 17A.17(8)

8. An individual who participates in the making of any proposed or final decision in a contested case shall not have personally investigated, prosecuted, or advocated in connection with that case, the specific controversy underlying that case, or another pending factually related contested case, or pending factually related controversy that may culminate in a contested case, involving the same parties. In addition, such an individual shall not be subject to the authority, direction, or discretion of any person who has personally investigated, prosecuted, or advocated in connection with that contested case, the specific controversy underlying that contested case, or a pending factually related contested case or controversy, involving the same parties. However, this section shall not be construed to preclude a person from serving as a presiding officer solely because that person determined there was probable cause to initiate the proceeding.

Iowa Code § 669.3(1)

1. The attorney general, on behalf of the state of Iowa, shall consider, ascertain, adjust, compromise, settle, determine, and allow any claim that is subject to this chapter.

Excerpts from Iowa Rules of Professional Conduct
(October 2015 version)

Rule 32 (Preamble, Comment 18)

[18] Under various legal provisions, including constitutional, statutory, and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. These rules do not abrogate any such authority.

Rule 32:1.0 (Terminology, "informed consent" and "screened")

(e) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

(k) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these rules or other law.

Screened

[8] This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under rule 32:1.10, 32:1.11, 32:1.12, or 32:1.18.

[9] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to

the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce, and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other information, including information in electronic form, relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other information, including information in electronic form, relating to the matter, and periodic reminders of the screen to the screened lawyer and all other firm personnel.

[10] In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.

Rule 32:1.13 (Organization as Client, Comment 9)

Government Agency

[9] The duty defined in this rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these rules. See Scope [18]. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and ensuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This rule does not limit that authority. For example, the provisions of Iowa Code sections 232.90 and 232.114 adequately accommodate the potentially conflicting roles of county attorneys in criminal prosecutions and child in need of assistance or termination of parental rights proceedings. See Scope.

Some Key Cases

State ex rel Fletcher v. Executive Council of State of Iowa, 207 Iowa 923, 223 N.W.2d 737 (1929)

Attorney General lacked standing to represent the legislative branch in a declaratory action suit against the Executive Council and State Highway Commission to challenge the constitutionality of an act. The Attorney General is legal advisor to all parties in the action. The Court may not issue a purely advisory opinion.

State ex rel. Turner v. Iowa State Highway Commission, 186 N.W.2d 141 (Iowa 1971)

Attorney General lacked standing to pursue an action testing the validity of the governor's item veto because the Attorney General exercises no common law powers and lacked statutory authorization for such an action.

Motor Club of Iowa v. Dept. of Transportation, 251 N.W.2d 510, 515-516 (1977)

Attorney General lacks authority to pursue appeal once client agency declined to appeal. The Attorney General lacks authority to impose his or her will against the agency, although once a conflict develops, "[i]t might well provide the basis for substitution of counsel with a tardy appearance by the attorney general in behalf of what he perceives to be the state interest."

Iowa Automobile Dealer's Ass'n v. Iowa State Appeal Board, 420 N.W.2d 460, 462 (1988)

While Attorney General may not initiate litigation to challenge the constitutionality of an Iowa statute, the Attorney General may advise an agency a statute is unconstitutional and thereafter defend the agency which relied on the advice.

Fisher v. Iowa Bd. Of Optometry Examiners, 476 N.W.2d 48 (Iowa 1991)

The Attorney General may take affirmative steps to be or become a party in a contested case proceeding on behalf of the State and thereafter intervene in any resulting judicial review proceeding. Here, an AAG prosecuted an optometrist before the Optometry Board and petitioned for rehearing after the Board dismissed all charges. Independent counsel was appointed for the Board. The Attorney General (as forecast in *Motor Club*) represented the State, the public's interest.

AFSCME/Iowa Council 61v. State, 484 N.W.2d 390 (Iowa 1992)

Attorney General filed an amicus curiae brief on behalf of the State after the Governor declined to follow a formal opinion on honoring an arbitration agreement and was appointed independent counsel.

Fisher v. Iowa Bd. Of Optometry Examiners, 510 N.W.2d 873, 877 (Iowa 1994)

"Fisher notes that the complaint against him was prosecuted through the board's own legal counsel, an Iowa assistant attorney. After the board's initial finding this attorney is said to have switched roles and filed a petition for rehearing on behalf of the State. Fisher thinks these dual roles allowed the board to act as both adjudicator in the original hearing and as prosecutor in the subsequent hearing.

We fail to see how the assistant attorney general caused the board to become a prosecutor. The assistant attorney general did at times advise the board in its rulemaking and complaint-filing capacity. But this fact did not, standing alone, impute the prosecutorial role to the board. The board did not prosecute the case; the attorney general did. It is neither unlawful nor uncommon for the attorney general to both give advice to various administrative agencies, and thereafter prosecute actions brought by the agency."

16 Ia. Prac., Lawyer and Judicial Ethics § 4:2(c)

Iowa Practice Series TM
Lawyer and Judicial Ethics
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Gregory C. Sisk
Mark S. Cady
Part III. The Iowa Rules of Professional Conduct
Subpart B. The Iowa Rules of Professional Conduct
Chapter 4. Preamble, Scope, and Terminology of the Iowa Rules of Professional Conduct
by Gregory C. Sisk
§ 4:2. Scope
Author's Commentary

§ 4:2(c) The government lawyer's client and litigating authority

West's Key Number Digest
West's Key Number Digest, Attorney and Client ⚖32(2)
West's Key Number Digest, Attorney General ⚖1
West's Key Number Digest, District and Prosecuting Attorneys ⚖8
Legal Encyclopedias
C.J.S., Attorney and Client §§ 42 to 43
C.J.S., Attorney General §§ 1 to 19
C.J.S., District and Prosecuting Attorneys §§ 20 to 21, 29

One of the distinctive characteristics of government lawyers, at both the state and federal level and especially in the context of civil litigation, is the heightened responsibility or authority that they may possess with respect to decisions on whether to litigate, how to manage the litigation, what issues to raise, and whether to settle.

By federal statute,[1] authority regarding the initiation and the conduct of litigation is centralized in the Attorney General of the United States and thus in the United States Department of Justice.[2] Congress explained this statutory directive as intended to ensure "a unity of decision, a unity of jurisprudence in the executive law of the United States."[3] Accordingly, as legal counsel for a government party, the Department of Justice has largely plenary control over the litigation above and beyond that of its client agencies and departments. In the private sector, if a client orders an attorney to file a motion or an appeal or to raise a particular claim or argument, and the attorney fails to do so for reasons other than ethical limitations, the client may have a malpractice claim against the attorney. By contrast, the Department of Justice is in charge of both litigation strategy and litigation objectives, including which actions to bring, which claims to assert, and which arguments to make, with the advice—but not the control—of the client agency. Moreover, in the private sector, if the client does not like the advice that an attorney gives or the work that he or she performs, the client can discharge the attorney and seek new counsel. By contrast, federal government entities are "captive clients" who are unable to "fire" the Department of Justice as litigation counsel.[4]

This is not to say that the relationship between federal Department of Justice lawyers and the officers and in-house counsel for the client agency is an adversarial one for the most part. In general, agency counsel and Department of Justice litigating attorneys work together closely and cooperatively. Although the agency officials technically are not in charge of the litigation, they may be more familiar with the agency practices implicated by the lawsuit, as well as with the actual facts of the case, and thus their advice is taken seriously by the litigating government lawyers. But if there is disagreement, the Department of Justice has authority to make the final decision regarding litigation objectives and means.

The authority of the Attorney General of Iowa to represent the State of Iowa in litigation likewise is broad, but his independence of judgment against that of a client agency is sometimes more circumscribed than the federal Attorney General. By state statute, the Attorney General is permitted as of right to "prosecute ... in any ... tribunal ... when, in the attorney general's judgment, the interests of the state requires such action."[5] Thus, the Attorney General and his assistants are designated as the state's counsel to appear in court. However, when a civil matter involves representation of a state agency, the Iowa Supreme Court has held that the "attorney general should not seek to perform his duty to represent a

department of state government where the goals of the department conflict with what the attorney general believes is the state interest."[6] Thus, the Attorney General is not permitted to pursue litigation contrary to the wishes of the client agency. Under Iowa caselaw, the Attorney General may not directly represent an agency when the Attorney General's legal position conflicts with the preferred position of the agency. Nonetheless, when independent counsel has been appointed to represent the agency,[7] the Attorney General may appear separately in an administrative or judicial tribunal on behalf of the state to present the Attorney General's views as to the best interests of the state.[8]

Still, the Iowa Attorney General's authority in certain areas is rather plenary in nature and thus parallel to the largely independent litigating authority of the United States Attorney General. For example, based upon the Attorney General's evaluation of what outcome promotes "substantial justice," and subject to court approval, the Attorney General is expressly authorized under the Iowa Tort Claims Act to compromise or settle tort suits in which the State of Iowa or state employees may be named as defendants.[9] Likewise, under certain consumer protection statutes, the Attorney General is authorized to sue in the public interest and on behalf of residents of the state, and further has control of that litigation, including decisions about instituting, settling, or dismissing such suits, even though individual consumers may have filed complaints with the Attorney General about the subject matter and may receive reimbursement if the Attorney General prevails.[10] In these matters, the Attorney General controls the disposition of litigation involving the state government.

Importantly, whatever may be the standards and practices regarding litigating authority and the powers of the government lawyer acting under the Attorney General of the United States or the Attorney General of Iowa, they are left undisturbed by the new Iowa Rules of Professional Conduct. Although from time to time some commentators have suggested using the ethics rules to set restrictions on the powers of government lawyers with respect to client agencies, the rule drafters have thus far refused to be so paternalistic or to intrude into an area that has its own set of rules and statutory limits. Thus, Paragraph 18 of the Scope of the Iowa Rules of Professional Conduct expressly acknowledges that government lawyers may have authority to make decisions that ordinarily would be reserved to clients, such as whether to settle and whether to appeal. The paragraph concludes by saying: "These rules do not abrogate any such authority."

Similarly, both Paragraph 18 of the Scope and Comment 9 to Rule 1.13[11] of the Iowa rules explain that conflict of interest principles cannot be extrapolated directly from the private to the governmental context. Thus, the government lawyer's client may be a specific agency, a branch of government, or the government as a whole. The government lawyer may have the authority to question the conduct of officials within a client agency or other governmental entity in a manner and for a purpose beyond that which would occur in the private attorney-client relationship. The new rules do not limit that authority.

Footnotes

1 *See, e.g.*, 28 U.S.C. §§ 516, 519.

2 *See generally* GREGORY C. SISK, LITIGATION WITH THE FEDERAL GOVERNMENT § 1.02, at 2–18 (4th ed., ALI-ABA, 2006).

3 Cong. Globe, 41st Cong., 2d Sess. at 3036 (1870).

4 Susan M. Olson, *Challenges to the Gatekeeper: The Debate Over Federal Litigating Authority*, 68 JUDICATURE 71, 73 (1984).

5 Iowa Code § 13.2(2).

6 Motor Club of Iowa v. Department of Transp., 251 N.W.2d 510, 515 (Iowa 1977).

7 *See* Iowa Code § 13.7.

8 *See* Fisher v. Iowa Bd. of Optometry Examiners, 476 N.W.2d 48, 50–51 (Iowa 1991); *see also* AFSCME/Iowa Council 61 v. State, 484 N.W.2d 390 (Iowa 1992) (after independent counsel was appointed to represent the Governor, when the Attorney General declined to support the Governor's legal position, Attorney General presented views as amicus curiae).

9 Iowa Code § 669.9.

[10] *See, e.g.*, Iowa Code §§ 537.6103 to 6116, 714.16(7), 714.16(15).

[11] Rule 1.13, Comment 9, Iowa R. Prof'l Conduct.

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CONFLICTS RESOLUTION POLICY

The lawyers in this office are subject to the Iowa Rules of Professional Conduct. Additional statutes govern conflicts of interest for officials and employees in particular circumstances. In order to identify and resolve conflicts of interest and ethical issues that may arise within this office, the Department of Justice promulgates the following policy.

CONFLICTS RESOLUTION COMMITTEE

A Conflicts Resolution Committee is established to which potential conflicts of interest or ethical issues may be raised by any attorney in this office. The Committee will review factual information and relevant authorities to determine whether a conflict of interest exists or an ethical problem is presented and make recommendations concerning the appropriate course of conduct. The Committee will create, and where necessary, revise standard forms for disqualification and screening of conflicted employees.

Members of the Committee are:

Pamela Griebel, Division Director, Licensing and Administrative Law Division

Diane Stahle, Division Director, Regents and Human Services Division

Kevin Cmelik, Division Director, Criminal Appeals Division

Assistant Attorney General Michael Bennett will serve as counsel to the Committee.

If an attorney is in doubt as to the existence of a conflict of interest, the attorney should consult with the Conflict Committee.

IDENTIFICATION OF CONFLICTS

Clients In serving as counsel to government agencies and officials, the identification of who the "client" being served may be broadened by constitution, statute and common law to allow attorneys in this office, in some circumstances, to make decisions that would normally be vested in a private client, to represent several agencies in intragovernmental controversies, and to question and take action to rectify wrongful acts of officials.

Former Clients Upon initial appointment and throughout duties with the Department of Justice, attorneys shall identify legal matters in which they have participated

personally and substantially in prior practice and in which the Department is currently engaged or likely to be engaged in representation. Attorneys shall follow the procedures in this policy for disqualification and screening for the matters so identified. Any non-attorney staff member that has worked on a legal matter in prior employment that the Department is engaged in shall also follow and abide by the screening procedures in this policy.

Current Clients Bearing in mind the flexibility granted government attorneys under the Iowa Rules of Professional Conduct to provide advice to multiple agencies and to work to resolve intra-agency controversies, attorneys should be mindful of matters where representation of an agency or official should be materially limited by responsibilities to another agency or official. In such cases, the attorney shall follow the procedures in this policy for disqualification and screening regarding the conflicted matters or clients.

Personal Conflicts Throughout employment, attorneys shall continue to identify potential conflicts that may arise from the attorney's personal interests and relationships and responsibilities to third parties that may conflict with or limit representation of a client. Where these personal conflicts exist, attorneys shall follow the procedures in this policy for disqualification and screening regarding the conflicted matters or clients or seek written waiver by the affected parties upon written informed consent for conflicts that may be waived. .

DISQUALIFICATION AND SCREENING

The purpose of screening a disqualified lawyer is to assure that confidential information known by the lawyer is protected and advise attorneys handling the disqualified matter not to communicate with the disqualified attorney regarding the matter. To accomplish these goals the following procedures will be followed:

(1) The disqualified attorney will fully advise their direct supervisor of the conflict of interest as soon as possible after a conflict arises.

(2) The disqualified attorney will execute a written statement of disqualification and screening form in substantial conformance with the standard forms approved under this

policy acknowledging the duty not to communicate with other lawyers or access files regarding the conflicted matter.

(3) The disqualified attorney's supervisor or, if a referral is made, the Conflicts Resolution Committee, will determine what additional measures will be required to advise attorneys handling the disqualified matter and assure that these attorneys do not communicate with the disqualified lawyer regarding the matter. This may include written notification of the disqualification to other attorneys, written acknowledgement by attorneys handling the matter, periodic reminders, limiting access to case files, or other actions deemed necessary to ensure confidences and document compliance.

(4) A memorandum will be drafted setting out the basic facts and circumstances of the conflict of interest and documenting the measures taken to deal with the conflict. This memorandum will be filed, along with any written acknowledgements required by this policy, with the Chief Deputy in a permanent file. The attorney's disqualification will also be recorded in Prolaw system.

WAIVERS

As an alternative to disqualification and screening, an attorney that has a conflict of interest may represent the state in the conflicted matter if, after determining that the conflict may be waived under the Rules of Professional Conduct and other applicable law, the Department of Justice approves the attorney's involvement, the appropriate agency gives written informed consent to the representation, and each affected former client gives written informed consent to the representation all in strict compliance with the requirements of Iowa Court Rules 32:1.7, 32:1.9, and 32:1.11. Any such informed consent waivers and a memorandum setting out the basic facts and circumstances of the potential conflict and actions taken to receive informed consent shall be filed with the Chief Deputy to be kept in a permanent file.

Model Forms

STATEMENT OF DISQUALIFICATION AND SCREENING

I, [name & title], state that I am disqualified from participation in [pending matter]. I acknowledge that an ethical screen is in place for this matter. I will not participate in any manner in this matter, will not review or access any files or documents in this matter and will not communicate with any attorney in the Department of Justice with regard to this matter. All authority in this case has been delegated to [responsible attorney or division].

SIGNATURE

DATE

CC: Attorney's Supervisor
Attorney(s) Assigned to Matter and Supervisor
Conflict Resolution Committee

ACKNOWLEDGMENT OF DISQUALIFICATION AND SCREENING

I, [name & title], state that I have been notified that [name and title of disqualified attorney] is disqualified from participation in [pending matter], and that an ethical screen is in place regarding this matter. I will not communicate with [disqualified attorney] regarding this matter.

SIGNATURE

DATE

CC: Attorney's Supervisor
Conflict Resolution Committee

ACKNOWLEDGMENT OF DELEGATION, DISQUALIFICATION AND SCREENING

I, [name & title], state that I have been delegated authority in [pending matter]. I have been notified that [name and title of disqualified attorney] is disqualified from participation in [pending matter], and that an ethical screen is in place regarding this matter. I will not communicate with [disqualified attorney] regarding this matter. All attorneys in the Iowa Department of Justice concerned in this matter have been notified

of this delegation and have been advised not to communicate with [disqualified lawyer] regarding this matter. All affected parties in this matter have been notified to direct communications in this matter to me.

SIGNATURE

DATE

CC: Attorney's Supervisor

Attorney(s) Assigned to Matter

Conflict Resolution Committee

ACKNOWLEDGMENT OF DENIAL OF ACCESS TO ELECTRONIC FILES

I, [name & title], state that on [date], I blocked access to all Department of Justice electronic files regarding [matter or matters] by [disqualified attorney].

SIGNATURE

DATE

CC: Conflict Resolution Committee

To: Attorneys Who Prosecute or Advocate in Contested Cases
(Cc: Chief Deputy Eric Tabor, Solicitor General Jeff Thompson)

From: Conflict Committee, Division Directors Pam Griebel, Diane Stahle, Kevin Cmelik

Date: March 8, 2016

Re: Advice in Contested Cases

It is a violation of litigants' procedural due process rights and the Administrative Procedure Act for an attorney who advocates, prosecutes or personally investigates in a contested case to provide advice to an agency decision-maker regarding that pending contested case or a factually-related matter. *See Bostko v. Davenport Civil Rights Com'n*, 774 N.W.2d 841, 852 (Iowa 2009) and Iowa Code § 17A.17(8). Therefore, please advise each board or other agency before which you prosecute or advocate of the following procedure to receive legal advice during a pending contested case:

(1) The attorney prosecuting or advocating a case before an agency may not advise the agency decision-maker in the contested case nor communicate with the decision-maker regarding any issue of law or fact in the contested case unless the other parties to the case have had notice and an opportunity to be present.

(2) If the agency needs advice on any matter connected to a contested case, the agency can do one of the following:

(a) Consult with the administrative law judge (ALJ) if the board or other agency is conducting the case with the assistance of an ALJ.

(b) Contact Chief Deputy Attorney General Eric Tabor to assign an independent attorney to advise the agency.

(c) If Chief Deputy Tabor is unavailable, the agency may contact Solicitor General Jeff Thompson to arrange for independent counsel.

If independent counsel is appointed, you will also need to execute and file with the Conflict Committee an ethical screen between you and independent counsel to prevent ex parte communication between you regarding the pending case and to block access to each other's paper or electronic records regarding the matter. Please contact a Conflict Committee member (Diane Stahle, Pam Griebel, or Kevin Cmelik) or Conflict Committee Counsel Mike Bennett to execute an ethical screen.

Finally, these limitations on communicating with the agency decision-maker will normally not extend to judicial review of the final agency action.

beyond the scope of these rules.

Former Client

[20] The duty of confidentiality continues after the client-lawyer relationship has terminated. *See* rule 32:1.9(c)(2). See rule 32:1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

Required Disclosure Adverse to Client

[21] Rule 32:1.6(c) requires a lawyer to reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent imminent death or substantial bodily harm. Rule 32:1.6(c) differs from rule 32:1.6(b)(1) in that rule 32:1.6(b)(1) permits, but does not require, disclosure in situations where death or substantial bodily harm is deemed to be reasonably certain rather than imminent. For purposes of rule 32:1.6, "reasonably certain" includes situations where the lawyer knows or reasonably believes the harm will occur, but there is still time for independent discovery and prevention of the harm without the lawyer's disclosure. For purposes of this rule, death or substantial bodily harm is "imminent" if the lawyer knows or reasonably believes it is unlikely that the death or harm can be prevented unless the lawyer immediately discloses the information.
[Court Order April 20, 2005, effective July 1, 2005; October 15, 2015]

Rule 32:1.7: CONFLICT OF INTEREST: CURRENT CLIENTS

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

(c) In no event shall a lawyer represent both parties in dissolution of marriage proceedings.

Comment

General Principles

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person, or from the lawyer's own interests. For specific rules regarding certain concurrent conflicts of interest, see rule 32:1.8. For former client conflicts of interest, see rule 32:1.9. For conflicts of interest involving prospective clients, see rule 32:1.18. For definitions of "informed consent" and "confirmed in writing," see rule 32:1.0(e) and (b).

[2] Resolution of a conflict of interest problem under this rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be

materially limited under paragraph (a)(2).

[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved. *See also* comment to rule 32:5.1. Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this rule. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see comment to rule 32:1.3 and Scope.

[4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). *See* rule 32:1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. *See* rule 32:1.9. *See also* comments [5] and [29].

[5] Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. *See* rule 32:1.16. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. *See* rule 32:1.9(c).

Identifying Conflicts of Interest: Directly Adverse

[6] Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

[7] Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

Identifying Conflicts of Interest: Material Limitation

[8] Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend, or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that

a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

Lawyer's Responsibilities to Former Clients and Other Third Persons

[9] In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under rule 32:1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor, or corporate director.

Personal Interest Conflicts

[10] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See rule 32:1.8 for specific rules pertaining to a number of personal interest conflicts, including business transactions with clients. *See also* rule 32:1.10 (personal interest conflicts under rule 32:1.7 ordinarily are not imputed to other lawyers in a law firm).

[11] When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer related to another lawyer, e.g., a parent, child, sibling, spouse, cohabiting partner, or lawyer related in any other familial or romantic capacity, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent. The disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. *See* rule 32:1.10.

[12] A lawyer is prohibited from engaging in sexual relationships with a client unless the sexual relationship predates the formation of the client-lawyer relationship. *See* rule 32:1.8(j).

Interest of Person Paying for a Lawyer's Service

[13] A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. *See* rule 32:1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.

[13a] Where a lawyer has been retained by an insurer to represent the insured pursuant to the insurer's obligations under a liability insurance policy, the lawyer may comply with reasonable cost-containment litigation guidelines proposed by the insurer if such guidelines do not materially interfere with the lawyer's duty to exercise independent professional judgment to protect the reasonable interests of the insured, do not regulate the details of the lawyer's performance, and do not materially limit the professional discretion and control of the lawyer. The lawyer may provide the insurer with a description of the services rendered and time spent, but the lawyer may not agree to provide detailed information that would undermine the protection of confidential client-lawyer information, if the insurer will share such information with a third party. If the lawyer believes that

guidelines proposed by the insurer prevent the lawyer from exercising independent professional judgment or from protecting confidential client information, the lawyer shall identify and explain the conflict of interest to the insurer and insured and also advise the insured of the right to seek independent legal counsel. If the conflict is not eliminated but the insured wants the lawyer to continue the representation, the lawyer may proceed if the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation and the insured's informed consent is obtained pursuant to paragraph (b)(4).

Prohibited Representations

[14] Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b), some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.

[15] Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. *See* rule 32:1.1 (competence) and rule 32:1.3 (diligence).

[16] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law.

[17] Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Paragraph (c) provides a specific example of such a nonconsentable conflict, that is, where a lawyer is asked to represent both parties in a marriage dissolution proceeding. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a "tribunal" under rule 32:1.0(m)), such representation may be precluded by paragraph (b)(1).

Informed Consent

[18] Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. *See* rule 32:1.0(e) (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality, and the attorney-client privilege and the advantages and risks involved. *See* comments [30] and [31] (effect of common representation on confidentiality).

[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests.

Consent Confirmed in Writing

[20] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. *See* rule 32:1.0(b). *See also* rule 32:1.0(n) (writing includes electronic transmission). If it is not feasible to obtain or transmit the

writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. *See* rule 32:1.0(b). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

Revoking Consent

[21] A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other clients, and whether material detriment to the other clients or the lawyer would result.

Consent to Future Conflict

[22] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).

Conflicts in Litigation

[23] Paragraphs (b)(3) and (c) prohibit representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (a)(2). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met.

[24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal

relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved, and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.

[25] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1) of this rule. Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.

Nonlitigation Conflicts

[26] Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than litigation. For a discussion of directly adverse conflicts in transactional matters, see comment [7]. Relevant factors in determining whether there is significant potential for material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise, and the likely prejudice to the client from the conflict. The question is often one of proximity and degree. *See* comment [8].

[27] For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.

[28] Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest, or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication, or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.

Special Considerations in Common Representation

[29] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment, and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

[30] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. *See* rule 32:1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

[32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. *See* rule 32:1.2(c).

[33] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of rule 32:1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in rule 32:1.16.

Organizational Clients

[34] A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. *See* rule 32:1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

[35] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board, and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

[Court Order April 20, 2005, effective July 1, 2005]

Rule 32:1.8: CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

For example, one lawyer in a firm may not enter into a business transaction with a client of another member of the firm without complying with paragraph (a), even if the first lawyer is not personally involved in the representation of the client. The prohibitions set forth in paragraphs (j) and (l) are personal and are not applied to associated lawyers.
[Court Order April 20, 2005, effective July 1, 2005]

Rule 32:1.9: DUTIES TO FORMER CLIENTS

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person, and

(2) about whom the lawyer had acquired information protected by rules 32:1.6 and 32:1.9(c) that is material to the matter, unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these rules would permit or require with respect to a client.

Comment

[1] After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this rule. Under this rule, for example, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction. Nor could a lawyer who has represented multiple clients in a matter represent one of the clients against the others in the same or a substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent. *See* comment [9]. Current and former government lawyers must comply with this rule to the extent required by rule 32:1.11.

[2] The scope of a "matter" for purposes of this rule depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdictions. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

[3] Matters are "substantially related" for purposes of this rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a

tenant of the completed shopping center in resisting eviction for nonpayment of rent. Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.

Lawyers Moving Between Firms

[4] When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

[5] Paragraph (b) operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by rules 32:1.6 and 32:1.9(c). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict. See rule 32:1.10(b) for the restrictions on a firm once a lawyer has terminated association with the firm.

[6] Application of paragraph (b) depends on a situation's particular facts, aided by inferences, deductions, or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

[7] Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. *See* rules 32:1.6 and 32:1.9(c).

[8] Paragraph (c) provides that information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client.

[9] The provisions of this rule are for the protection of former clients and can be waived if the client gives informed consent, which consent must be confirmed in writing under paragraphs (a) and (b). *See* rule 32:1.0(e). With regard to the effectiveness of an advance waiver, see comment [22] to rule 32:1.7. With regard to disqualification of a firm with which a lawyer is or was formerly associated, see rule 32:1.10.

[Court Order April 20, 2005, effective July 1, 2005]

Rule 32:1.10: IMPUTATION OF CONFLICTS OF INTEREST: GENERAL RULE

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by rule 32:1.7 or 32:1.9, unless

(1) the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or

(2) the prohibition is based upon rule 32:1.9(a) or (b) and arises out of the disqualified lawyer's association with a prior firm, and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;

(ii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and

(iii) certifications of compliance with these rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by rules 32:1.6 and 32:1.9(c) that is material to the matter.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in rule 32:1.7.

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by rule 32:1.11.

Comment

Definition of "Firm"

[1] For purposes of the Iowa Rules of Professional Conduct, the term "firm" denotes lawyers in a law partnership, professional corporation, sole proprietorship, or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization. *See* rule 32:1.0(c). Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. *See* rule 32:1.0, comments [2] - [4].

Principles of Imputed Disqualification

[2] The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a)(1) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by rules 32:1.9(b), 32:1.10(a), and 32:1.10(b).

[3] The rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that

lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be disqualified. On the other hand, if an opposing party in a case were owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm.

[4] The rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation if the lawyer is prohibited from acting because of events before the person became a lawyer, for example, work that the person did while a law student. Such persons, however, ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect. *See* rules 32:1.0(k) and 32:5.3.

[5] Rule 32:1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a present client of the firm, which would violate rule 32:1.7. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by rules 32:1.6 and 32:1.9(c).

[6] Rule 32:1.10(c) removes imputation with the informed consent of the affected client or former client under the conditions stated in rule 32:1.7. The conditions stated in rule 32:1.7 require the lawyer to determine that the representation is not prohibited by rule 32:1.7(b) and that each affected client or former client has given informed consent to the representation, confirmed in writing. In some cases, the risk may be so severe that the conflict may not be cured by client consent. For a discussion of the effectiveness of client waivers of conflicts that might arise in the future, see rule 32:1.7, comment [22]. For a definition of informed consent, see rule 32:1.0(e).

[7] Rule 32:1.10(a)(2) similarly removes the imputation otherwise required by rule 32:1.10(a), but unlike section (c), it does so without requiring that there be informed consent by the former client. Instead, it requires that the procedures laid out in sections (a)(2)(i)-(iii) be followed. A description of effective screening mechanisms appears in rule 32:1.0(k). Lawyers should be aware, however, that, even where screening mechanisms have been adopted, tribunals may consider additional factors in ruling upon motions to disqualify a lawyer from pending litigation.

[8] Paragraph (a)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[9] The notice required by paragraph (a)(2)(ii) generally should include a description of the screened lawyer's prior representation and be given as soon as practicable after the need for screening becomes apparent. It also should include a statement by the screened lawyer and the firm that the client's material confidential information has not been disclosed or used in violation of the rules. The notice is intended to enable the former client to evaluate and comment upon the effectiveness of the screening procedures.

[10] The certifications required by paragraph (a)(2)(iii) give the former client assurance that the client's material confidential information has not been disclosed or used inappropriately, either prior to timely implementation of a screen or thereafter. If compliance cannot be certified, the certificate must describe the failure to comply.

[11] Where a lawyer has joined a private firm after having represented the government, imputation is governed by rule 32:1.11(b) and (c), not this rule. Under rule 32:1.11(d), where a lawyer represents the government after having served clients in private practice, nongovernmental employment, or in another government agency, former-client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer.

[12] Where a lawyer is prohibited from engaging in certain transactions under rule 32:1.8, paragraph (k) of that rule, and not this rule, determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.

[Court Order April 20, 2005, effective July 1, 2005; October 15, 2015]

Rule 32:1.11: SPECIAL CONFLICTS OF INTEREST FOR FORMER AND CURRENT GOVERNMENT OFFICERS AND EMPLOYEES

(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

(1) is subject to rule 32:1.9(c); and

(2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person, acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this rule, the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

(1) is subject to rules 32:1.7 and 32:1.9; and

(2) shall not:

(i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or

(ii) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer, or arbitrator may negotiate for private employment as permitted by rule 32:1.12(b) and subject to the conditions stated in rule 32:1.12(b).

(e) As used in this rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter involving a specific party or parties, and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

(f) Prosecutors for the state or county shall not engage in the defense of an accused in any criminal matter during the time they are engaged in such public responsibilities. However, this paragraph does not apply to a lawyer not regularly employed as a prosecutor for the state or county who serves as a special prosecutor for a specific criminal case, provided that the employment does not create a conflict of interest or the lawyer complies with the requirements of rule 32:1.7(b).

Comment

[1] A lawyer who has served or is currently serving as a public officer or employee is personally subject to the Iowa Rules of Professional Conduct, including the prohibition against concurrent conflicts of interest stated in rule 32:1.7. In addition, such a lawyer may be subject to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this rule. See rule

32:1.0(e) for the definition of informed consent.

[2] Paragraphs (a)(1), (a)(2), and (d)(1) restate the obligations of an individual lawyer who has served or is currently serving as an officer or employee of the government toward a former government or private client. Rule 32:1.10 is not applicable to the conflicts of interest addressed by this rule. Rather, paragraph (b) sets forth a special imputation rule for former government lawyers that provides for screening and notice. Because of the special problems raised by imputation within a government agency, paragraph (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers.

[3] Paragraphs (a)(2) and (d)(2) apply regardless of whether a lawyer is adverse to a former client and are thus designed not only to protect the former client, but also to prevent a lawyer from exploiting public office for the advantage of another client. For example, a lawyer who has pursued a claim on behalf of the government may not pursue the same claim on behalf of a later private client after the lawyer has left government service, except when authorized to do so by the government agency under paragraph (a). Similarly, a lawyer who has pursued a claim on behalf of a private client may not pursue the claim on behalf of the government, except when authorized to do so by paragraph (d). As with paragraphs (a)(1) and (d)(1), rule 32:1.10 is not applicable to the conflicts of interest addressed by these paragraphs.

[4] This rule represents a balancing of interests. On the one hand, where the successive clients are a government agency and another client, public or private, the risk exists that power or discretion vested in that agency might be used for the special benefit of the other client. A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer's professional functions on behalf of the government. Also, unfair advantage could accrue to the other client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. On the other hand, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. Thus a former government lawyer is disqualified only from particular matters in which the lawyer participated personally and substantially. The provisions for screening and waiver in paragraph (b) are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service. The limitation of disqualification in paragraphs (a)(2) and (d)(2) to matters involving a specific party or parties, rather than extending disqualification to all substantive issues on which the lawyer worked, serves a similar function.

[5] When a lawyer has been employed by one government agency and then moves to a second government agency, it may be appropriate to treat that second agency as another client for purposes of this rule, as when a lawyer is employed by a city and subsequently is employed by a federal agency. However, because the conflict of interest is governed by paragraph (d), the latter agency is not required to screen the lawyer as paragraph (b) requires a law firm to do. The question of whether two government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these rules. *See* rule 32:1.13 comment [9].

[6] Paragraphs (b) and (c) contemplate a screening arrangement. *See* rule 32:1.0(k) (requirements for screening procedures). These paragraphs do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly relating the lawyer's compensation to the fee in the matter in which the lawyer is disqualified.

[7] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[8] Paragraph (c) operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.

[9] Paragraphs (a) and (d) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by rule 32:1.7 and is not otherwise prohibited by law.

[10] For purposes of paragraph (e) of this rule, a "matter" may continue in another form. In determining whether two particular matters are the same, the lawyer should consider the extent to which the matters involve the same basic facts, the same or related parties, and the time elapsed.

[Court Order April 20, 2005, effective July 1, 2005]

MEMORANDUM

TO: ALL MEMBERS OF THE CRIMINAL APPEALS DIVISION, PAM KEVIN CMELIK, SHERRI SOICH
(cc: Chief Deputy Eric Tabor, Solicitor General Jeff Thompson)

FROM: Conflict Committee- Directors Diane Stahle and Pam Griebel

DATE: ~~February 15~~ 23 MB, 2016

RE: Screening of Kevin Cmelik and Sherri Soich

Kevin Cmelik, Division Director of the Criminal Appeals Division, will be screened from Sherri Soich in the Criminal Appeals Division regarding the pending criminal appeal State of Iowa v. Chad Demey, Supreme Court Number 16-0109. Kevin's brother, Dennis Cmelik, has represented the appellant in the district court in this matter. Kevin relinquishes any supervisory authority over Sherri in this matter will take no action in this matter and will not communicate with Sherri or other members of the Criminal Appeals Division regarding this case or access any of the electronic or paper files in this matter. Sherri will not communicate with Kevin regarding this matter. Access to the Prolaw and shared server file for this case by Kevin will also be blocked.

The signatures below verify that Kevin and Sheri have read this Memorandum and that they will agree to comply with this screen. This Memorandum will be sent via e-mail to all members of the Criminal Appeals Division to advise the members of the existence of this screen and their duties under it.

Kevin Cmelik — 2-18-16
Kevin Cmelik — Date

Sherri Soich — Feb 22, 2016
Sherri Soich — Date

Bennett, Michael [AG]

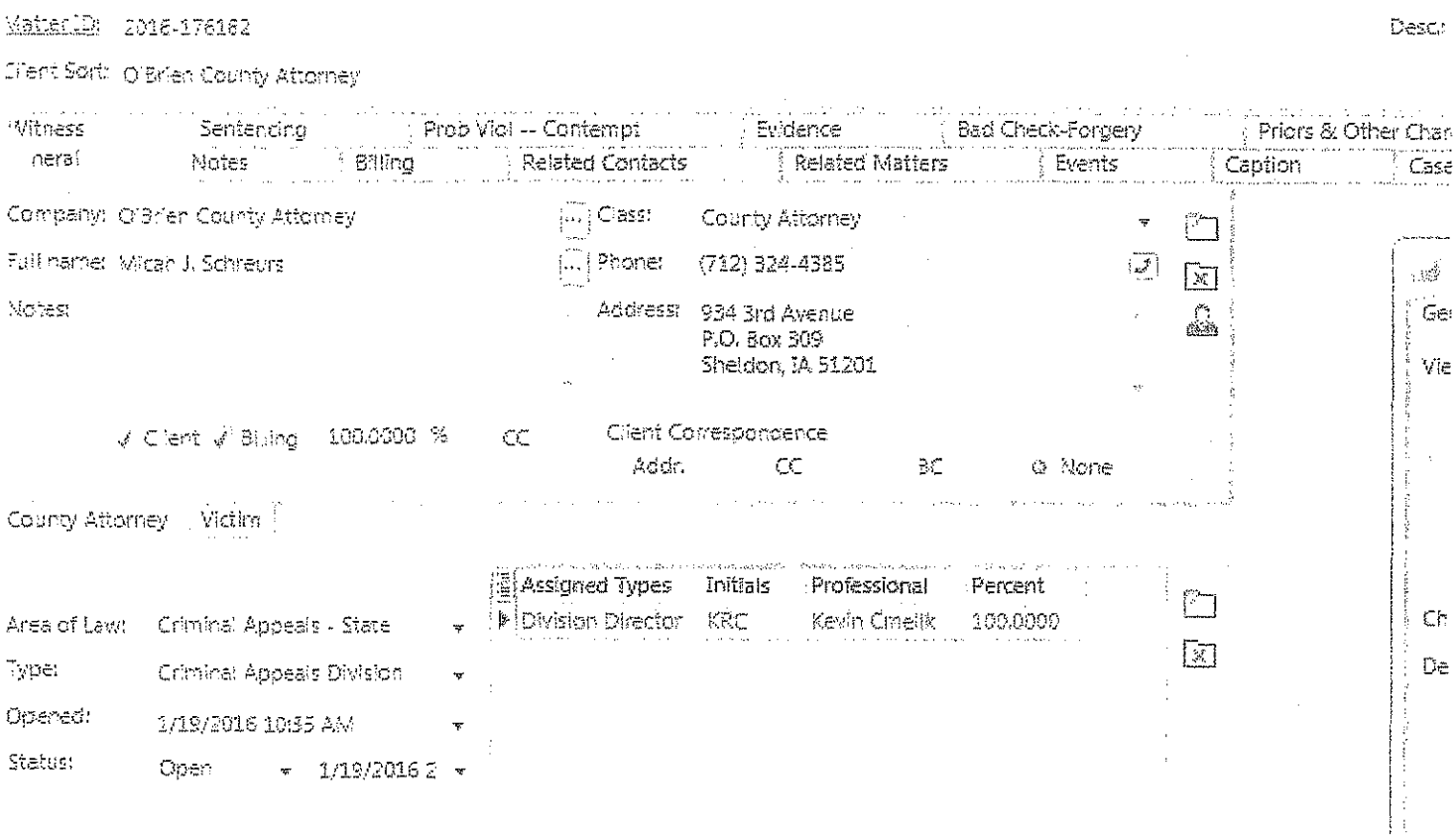
From: Bennett, Michael [AG]
Sent: Friday, February 19, 2016 9:58 AM
To: White, Cathleen [AG]
Subject: RE: ProLaw Security lockdown

Thank you Cathy. Have a great weekend!

Mike Bennett
Assistant Iowa Attorney General
PATC Division
(515) 281-6014

From: White, Cathleen [AG]
Sent: Friday, February 19, 2016 9:54 AM
To: Bennett, Michael [AG]
Cc: Finck, Kristle [AG]
Subject: ProLaw Security lockdown

Mike, per your request, I have locked Kevin out of the Chad Demey matter.



THOMAS J. MILLER
ATTORNEY GENERAL
CRIMINAL APPEALS DIVISION

ADDRESS REPLY TO:
1305 EAST WALNUT
HOOVER BUILDING
DES MOINES, IOWA 50319
TELEPHONE: 515/281-5976
FACSIMLE: 515/281-4902

Department of Justice

February 29, 2016

Jack B. Bjornstad
Jack Bjornstad Law Office
1017 Hwy. 71
P.O. Box 108
Okoboji, IA 51355

Re: Ethical screen; Chad Demey, Supreme Court Number 16-0109

Dear Mr. Bjornstad:

I represent the State in the current appeal Mr. Demey has filed.

Pursuant to the Rules of Professional Conduct, our office has implemented an ethical screen in this case. The defense attorney in the trial court, Dennis Cmelik, is the brother of our Criminal Appeals Division Director, Kevin Cmelik. Therefore, Kevin Cmelik will take no part in this office's litigation of this appeal.

Under this screen, Mr. Cmelik has relinquished supervisory duties in this case and will not take any actions in litigating it. He has not communicated with me about Mr. Demey's case except to assign me the file. Mr. Cmelik will not access my digital or paper files. Mr. Cmelik's access to the computer files regarding this case has been blocked. All members of the Criminal Appeals Division have received notice of these measures. If you have any questions, please let me know. Thanks very much.

Sincerely,

Sheryl A. Soich
Assistant Attorney Geneal

Griebel, Pam [AG]

From:	Bennett, Michael [AG]
Sent:	Thursday, February 11, 2016 2:57 PM
To:	Cmelik, Kevin [AG]; Mullins, Darrel [AG]; Griebel, Pam [AG]; Stahle, Diane [AG]; Buller, Tyler [AG]; Chambers, Bridget [AG]; Dickey, Elizabeth [AG]; Finck, Kristle [AG]; Hall, Sharon [AG]; Hanson, Kyle [AG]; Hines, Linda [AG]; Huser, Kelli [AG]; Link, Alexandra [AG]; Parrott, Benjamin [AG]; Pettinger, Jean [AG]; Robertson, Mary [AG]; Rogers, Aaron [AG]; Triick, Mary [AG]; Trout, Martha (Boesen) [AG]
Cc:	Thompson, Jeffrey [AG]; Tabor, Eric [AG]
Subject:	Mullins/Cmelik Screen regarding Sy Roueth Appeal
Attachments:	Cmelik Sy Roueth Screen.pdf
Importance:	High

Please find attached a memo containing an ethical screen that has been executed in a pending matter, Sy Roueth v. State of Iowa, Supreme Court No. 15-0954, screening Kevin Cmelik from this matter, which is being handled by Darrel Mullins. Please read the attached memorandum and comply with the restrictions setout therein. If you have any questions regarding this matter or your obligations under it, please contact Pam Griebel, Diane Stahle, or Mike Bennett.

Best regards,

Mike Bennett on behalf of the Conflict Committee
Assistant Iowa Attorney General
PATC Division
(515) 281-6014

MEMORANDUM

TO: ALL MEMBERS OF THE CRIMINAL APPEALS DIVISION, PAM KEVIN CMELIK, DARREL MULLINS
(cc: Chief Deputy Eric Tabor, Solicitor General Jeff Thompson)

FROM: Conflict Committee- Directors Diane Stahle and Pam Griebel

DATE: February 9, 2016

RE: Screening of Kevin Cmelik and Darrel Mullins

Kevin Cmelik, Division Director of the Criminal Appeals Division, will be screened from Darrel Mullins in the Criminal Appeals Division regarding the pending criminal appeal of Sy Roueth v. State, Supreme Court Number 15-0954. Kevin previously represented the appellant, and relinquishes any supervisory authority over Darrel in this matter. Kevin will take no action in this matter and will not communicate with Darrel or other members of the Criminal Appeals Division regarding this case or access any of the electronic or paper files in this matter. Darrel will not communicate with Kevin regarding this matter. Access to the Prolaw and shared server file for this case by Kevin will also be blocked.

Kevin and Darrel's signatures below verify that they have read this Memorandum and that they will agree to comply with this screen. This Memorandum will be sent via e-mail to all members of the Criminal Appeals Division to advise the members of the existence of this screen and their duties under it.

Kevin Cmelik — Kevin Cmelik — 1-10-16
Kevin Cmelik — Date

Darrel Mullins — Darrel Mullins — 2/11/16
Darrel Mullins — Date

Department of Justice

THOMAS J. MILLER
ATTORNEY GENERAL

ADDRESS REPLY TO:
HOOVER BUILDING
DES MOINES, IOWA 50319
TELEPHONE: 515-281-5164
FACSIMILE: 515-281-4902

February 12, 2016

Darrel Mullins
Assistant Iowa Attorney General
PATC Division
2nd Floor Hoover State Office Building
Des Moines, Iowa 50319

Jeremy Feitelson
Feitelson Law Firm
1200Valley West Drive, Suite 204
West Des Moines, IA 50266

Re: Ethical screen Sy Roueth v. State of Iowa, Supreme Court No. 15-0954.

Dear Mr. Feitelson:

Please be advised that our office has implemented an ethical screen in the matter of Sy Roueth v. State of Iowa, Supreme Court No. 15-0954. This measure has been taken due to the prior representation by Criminal Appeals Director, Kevin Cmelik, of Mr. Roueth in the initial appeal filed in this criminal prosecution while Mr. Cmelik served as an Assistant Appellate Public Defender. As you know, I am representing the State in the current appeal filed by Mr. Roueth.

Under this screen, Mr. Cmelik will not communicate with me or with other members of the Criminal Appeals Division regarding this case. In addition, Mr. Cmelik will not access my digital or paper files regarding this matter, and Mr. Cmelik's access to the computer files for this pending matter have been blocked. Notice of these measures have been provided to me and to all the other members of the Criminal Appeals Division. Finally, Mr. Cmelik has relinquished supervision duties for this matter and has and will not take any actions in litigating this matter.

Best regards,

Darrel Mullins
Assistant Iowa Attorney General
(515) 281-5976
Darrel.Mullins@iowa.gov

MEMORANDUM

To:	All Members of Regents and Human Services Division, Ben Bellus, Dan Hart (cc: Chief of Staff Eric Tabor, Solicitor Jeff Thompson, All members of Regents and Human Services Division, Jessica Whitney)
From:	Pam Griebel and Kevin Cmelik
Date:	October 19, 2015
Re:	Screening of Ben Bellus

Assistant Attorney General Ben Bellus of the Consumer Protection Division, also serves as President of the board of Primary Health Care, Inc., (Primary) a non-profit health care provider for primarily low income residents in several Iowa counties. Primary has filed a petition for a declaratory order before the Department of Human Services, dated October 9, 2015, to contest implementation of the state's Medicaid Managed Care Program. That matter is currently being handled by Dan Hart in the Regents and Human Services Division. Ben has abstained from votes on the Primary board regarding this matter.

A lawyer currently serving as a public officer or employee is subject to Court Rule 32:1.7 (Conflicts of Interest: current clients) and 32:1.9 (Duties to former clients). Unlike the rules applicable to private law firms, potential conflicts of interest by a single government lawyer are not imputed to other associated government officers or employees, although it is ordinarily prudent to screen such lawyers. *See* Court Rule 32:1.11, comment 2. *See also* Court Rule 32:1.10(a) and comments 2 and 3 (limiting imputation to associated attorneys of conflicts that arise from personal interests of attorneys).

The Rules of Professional Conduct strike a balance between competing interests, including but not limited to the interest of governmental bodies in attracting qualified candidates, the interest of clients in the continued preservation of their confidences following the termination of an attorney-client relationship, and the avoidance of the appearance of unfair advantage to former clients or governmental agencies. In compliance with the rules, we will implement an ethical screen between Ben and Dan Hart regarding the pending agency action regarding the Primary Health Care petition. Ben will have no contact with any record or file of this office regarding this matter. Furthermore, Ben and Dan Hart shall not communicate regarding this matter nor have communications regarding these matters in Ben's presence.

Notice of this ethical screen shall be provided to all attorneys and staff in the

Regents and Human Services Division by email, a copy of which shall be attached to this notice. Ben does not have access to the Regents and Human Services Division electronic files. Nothing in this screen shall restrict Ben's access to court filings or other documents which are public and open to any member of the public.

Below are the ethical screens to be executed by the affected attorneys in this matter:

STATEMENT OF DISQUALIFICATION AND SCREENING

I, Ben Bellus, state that I am disqualified from participation in the following matter: Petition for declaratory judgment filed by Primary Health Care, Inc. with the Iowa Department of Human Services on 10/9/2015. I acknowledge that an ethical screen is in place for this matter. I will not participate in any manner in this matter, will not review or access any files or documents in this matter and will not communicate with any attorney in the Department of Justice with regard to this matter. All authority in this agency case has been delegated to Dan Hart in the Regents and Human Services Division.

Ben Bellus, Assistant Iowa Attorney General — Date: 10/19/15

ACKNOWLEDGMENT OF DISQUALIFICATION AND SCREENING

I, Dan Hart, state that I have been notified that Ben Bellus is disqualified from participation in Petition for declaratory judgment filed by Primary Health Care, Inc. with the Iowa Department of Human Services on 10/9/2015, and that an ethical screen is in place regarding this matter. I will not communicate with Ben Bellus regarding this matter, nor allow him access to the files in this matter.

Dan Hart, Assistant Iowa Attorney General — Date: 10/19/15

Griebel, Pam [AG]

From:	Griebel, Pam [AG]
Sent:	Monday, October 19, 2015 3:45 PM
To:	AG Regents/HS; Stahle, Diane [AG]; Harvey, Donna [IDA]; Bellus, Benjamin [AG]
Cc:	Cmelik, Kevin [AG]; Bennett, Michael [AG]; Tabor, Eric [AG]; Whitney, Jessica [AG]
Subject:	Screening of Ben Bellus re DHS Matter Dan Hart is handling
Attachments:	BEN BELLUS SCREEN.pdf

I have attached a memorandum describing a screen between Ben Bellus, Consumer Protection Division, and Dan Hart and the rest of the Regents and Human Services Division, regarding a Petition for Declaratory Order filed on October 9, 2015, by Primary Health Care, Inc. and others.

The Statement of Disqualification and Screening has been signed by Ben and the Acknowledgment of disqualification and Screening has been signed by Dan. This is your notification not to have any communication with Ben about this matter. If you have any questions, you may contact Kevin Cmelik, Mike Bennett, or me

Pamela D. Griebel
Director, Licensing and Administrative Law Division
Iowa Attorney General's Office
Hoover Building, 2nd Fl.
Des Moines, IA 50319

Phone: 515-281-6403
Email: Pamela.Griebel@Iowa.gov

MEMORANDUM

TO:	Solicitor General, Jeff Thompson, Division Director Diane Stahle, Assistant Attorney Generals Amy Licht & Brad Horn Conflict File)
FROM:	Conflict Committee- Division Directors Pam Griebel, and Kevin Cmelik
DATE:	September 23, 2015
RE:	Iowa Department of Human Services Medicaid RFP Appeals: Iowa Total Care, Inc. v. DHS MED 16001573, Meridian Health Plan v. DHS MED 16001590, and Aetna Better Health of Iowa v. DHS MED 16001623

The Conflict Committee was asked to consider the measures necessary to allow provision of legal advice to the Director of the Iowa Department of Human Services (Department) and presentation of contested administrative appeals by the Iowa Attorney General's Office pending before the Iowa Department of Human Services regarding requests for proposal (RFP) awarded to the following providers for administration services of the Medicaid program in the following matters: Iowa Total Care, Inc. v. DHS MED 16001573, Meridian Health Plan v. DHS MED 16001590, and Aetna Better Health of Iowa v. DHS MED 16001623.

Division Director Diane Stahle, and Assistant Iowa Attorney Generals Amy Licht and Brad Horn are currently assigned to prosecute these appeals before the Department. Serving in this advocacy role and, at the same time, giving legal advice to the Department in the adjudicative function would likely violate the procedural due process rights of litigants. *See Bostko v. Davenport Civil Rights Com'n*, 774 N.W.2d 841, 852 (Iowa 2009) (combined advocacy and adjudicative function by a person involved in the process creates an appearance of fundamental unfairness in the administrative process). Further, by statute, no person who prosecutes, advocates or personally investigates in connection with a contested case, the specific controversy underlying that case, or another pending factually related contested case, or pending factually related controversy that may culminate in a contested case, involving the same parties, may participate in the making of any proposed or final decision in a contested case. Iowa Code § 17A.17(8).

Solicitor General, Jeff Thompson, has offered to serve as legal advisor to the Director of the Department in the appeals of these matters. It is our recommendation that an ethical screen be executed between Solicitor General Thompson and Division Director Stahle Amy Licht, and Brad Horn regarding the above-listed contested matters, as well as blocking access to the computer files or Prolaw files of these attorneys regarding these

appeals ensuring that the attorneys prosecuting these appeals and counsel advising the Director do not engage in ex parte communications regarding these cases Additionally, an individual subject to the authority, direction or discretion of a person who has personally investigated, prosecuted or advocated in connection with the contested case shall not participate in making the proposed final decision in a contested case. Iowa Code §17A.17(8). It is therefore our recommendation that all members of the Regents and Human Services Division of the office shall also be screened from Solicitor Thompson with regard to these pending appeals to ensure that they do not participate in the advice function to the Director.

ACKNOWLEDGMENT OF DELEGATION, DISQUALIFICATION AND SCREENING

I, Jeff Thompson, state that I have been delegated authority to provide legal advice to the Director of the Iowa Department of Human Services regarding pending contested case proceedings in the following matters: Iowa Total Care, Inc. v. DHS MED 16001573, Meridian Health Plan v. DHS MED 16001590, and Aetna Better Health of Iowa v. DHS MED 16001623. I have been notified that Division Director Diane Stahle and Assistant Iowa Attorneys General Amy Licht and Brad Horn, are prosecuting these matters before the Director and are thereby disqualified from rendering the Director legal advice on these matters until final agency action is rendered in these matters. I acknowledge that an ethical screen is in place regarding these matters. I will not have ex parte communications with Diane, Amy, or Brad regarding these matters. I will also not have ex parte communications with other members of the Regents and Human Services Division of the office regarding these matters, as they are under the direct supervision of Diane Stahle. I will not review or access any files or documents of regarding the prosecution of these appeals by other than those received by the parties in these matters in the normal course of adversarial proceedings All affected parties in these matters have been notified to direct communications regarding advice to the Director in these matters to me.

Jeff Thompson
Solicitor General

Signed this 25 day of September, 2015
CC: Diane Stahle, Amy Licht, Brad Horn
Conflict Resolution Committee

STATEMENT OF DISQUALIFICATION AND SCREENING

I, Diane Stahle, state that I am disqualified from participation in rendering advice to the Director of the Iowa Department of Human Services on pending appeals before the Department in contested cases that I am prosecuting in the following matters: Iowa Total Care, Inc. v. DHS MED 16001573, Meridian Health Plan v. DHS MED 16001590, and Aetna Better Health of Iowa v. DHS MED 16001623. I acknowledge that an ethical screen is in place for these matters. Until final agency action is completed on these contested case matters, I agree to abide by the following: 1) I will not participate in any manner in providing legal advice to the Director on these matters. 2) I will not review or access any files or documents rendering such advice in these matters other than those received by the parties in these matters in the normal course of adversarial proceedings 3) I will not communicate with any other employee of the Iowa Department of Justice with regard to legal advice provided to the Director in this matter. 4) I will not have ex parte communication with Solicitor Jeff Thompson regarding this matter.

All authority to provide legal advice to the ~~Commission~~ Director has been delegated to Solicitor General Jeff Thompson.

Diane Stahle
Division Director, Regents and Human Services Division

Signed this 23rd day of September, 2015

CC: Jeff Thompson, Amy Licht, Brad Horn
Conflict Resolution Committee

STATEMENT OF DISQUALIFICATION AND SCREENING

I, Amy Licht, state that I am disqualified from participation in rendering advice to the Director of the Iowa Department of Human Services on pending appeals before the Department in contested cases that I am prosecuting in the following matters: Iowa Total Care, Inc. v. DHS MED 16001573, Meridian Health Plan v. DHS MED 16001590, and Aetna Better Health of Iowa v. DHS MED 16001623. I acknowledge that an ethical screen is in place for these matters. Until final agency action is completed on these contested case matters, I agree to abide by the following: 1) I will not participate in any manner in providing legal advice to the Director on these matters. 2) I will not review or access any files or documents rendering such advice in these matters other than those received by the parties in these matters in the normal course of adversarial proceedings 3) I will not communicate with any other employee of the Iowa Department of Justice with regard to legal advice provided to the Director in this matter. 4) I will not have ex parte communications with Solicitor Jeff Thompson regarding this matter.

All authority to provide legal advice to the ~~Commission~~ Department has been delegated to Solicitor General Jeff Thompson. ALL

Amy Licht
Assistant Iowa Attorney General

Signed this 29 day of September, 2015

CC: Jeff Thompson, Diane Stahle, Brad Horn
Conflict Resolution Committee

STATEMENT OF DISQUALIFICATION AND SCREENING

I, Brad Horn, state that I am disqualified from participation in rendering advice to the Director of the Iowa Department of Human Services on pending appeals before the Department in contested cases that I am prosecuting in the following matters: Iowa Total Care, Inc. v. DHS MED 16001573, Meridian Health Plan v. DHS MED 16001590, and Aetna Better Health of Iowa v. DHS MED 16001623. I acknowledge that an ethical screen is in place for these matters. Until final agency action is completed on these contested case matters, I agree to abide by the following: 1) I will not participate in any manner in providing legal advice to the Director on these matters. 2) I will not review or access any files or documents rendering such advice in these matters other than those received by the parties in these matters in the normal course of adversarial proceedings 3) I will not communicate with any other employee of the Iowa Department of Justice with regard to legal advice provided to the Director in this matter. 4) I will not have ex parte communications with Solicitor Jeff Thompson regarding this matter.

All authority to provide legal advice to the ~~Commission~~ Director has been delegated to Solicitor General Jeff Thompson.

Brad Horn
Assistant Iowa Attorney General

Signed this 23rd day of September, 2015

CC: Jeff Thompson, Diane Stahle, Brad Horn
Conflict Resolution Committee

MEMORANDUM

TO: Chief Deputy, Eric Tabor
(cc: Assistant Attorneys General Katie Fiala and Michael Bennett, Conflict File)

FROM: Conflict Committee- Division Directors Pam Griebel, Diane Stahle, and Kevin Cmelik

DATE: August 7, 2015

RE: Representation of Iowa Civil Rights Commission in contested cases.

You asked the Conflict Committee to consider the necessity of appointment of conflict counsel on an on-going basis to advise Iowa Civil Rights Commission (ICRC) in its adjudicative function during contested case proceedings, and, if so, to suggest an Assistant Attorney General for such appointment. Assistant Iowa Attorney General Katie Fiala is currently assigned to represent the ICRC. In this role, Katie serves in a prosecutorial function during contested case proceedings. Serving in this prosecutorial role and, at the same time, giving legal advice to the ICRC in the adjudicative function may violate the procedural due process rights of litigants. *See Bostko v. Davenport Civil Rights Com'n*, 774 N.W.2d 841, 852 (Iowa 2009) (combined advocacy and adjudicative function by a person involved in the process creates an appearance of fundamental unfairness in the administrative process). Involvement by an advocate to defend final action in judicial proceedings does not normally raise these fairness issues. *Id.* Further, by statute, no person who prosecutes, advocates or personally investigates in connection with a contested case, the specific controversy underlying that case, or another pending factually related contested case, or pending factually related controversy that may culminate in a contested case, involving the same parties, may participate in the making of any proposed or final decision in a contested case. Iowa Code § 17A.17(8). The prosecutor is accordingly barred from advising the Commission as decisionmaker in the contested case.

Therefore, it is our recommendation that alternative counsel be appointed on an on-going basis to provide legal advice to the ICRC in contested cases through final agency action. We would propose Assistant Iowa Attorney General Michael Bennett serve in this advisory role to the ICRC. We would propose that an ethical screen be implemented between Mike and Katie regarding contested cases pending before the ICRC through final agency action. Further, that Katie and Mike should not have access to each other's computer files or Prolaw matters regarding ICRC cases, and they shall have no communications regarding these pending matters.

Additionally, an individual subject to the authority, direction or discretion of a person who has personally investigated, prosecuted or advocated in connection with the contested case shall not participate in making the proposed final decision in a contested

case. Iowa Code §17A.17(8). Therefore it is our recommendation that measures be taken to ensure that substitute counsel for these matters is not in the supervisory chain of those that have taken an active role in prosecuting these matters –including advice or direction- and/or that an ethical screen is erected to prevent communication with substitute counsel for the ICRC regarding these contested cases. We propose ethical screens be implemented for Katie and Mike's supervisors, Assistant Iowa Attorney Generals Kevin Cmelik and Thomas Ferguson, to ensure that they do not participate in the in the prosecution of these matters (Ferguson) or the advice function to the Commission (Cmelik).

We recommend that if a state agency represented by this office is a party in a contested matter before the ICRC, then a referral will be made to Chief Deputy Attorney General Eric Taber, to ensure that proper attorney assignments, ethical screens, and attorney supervision channels are in place to ensure the ethical representation of the Commission and affected agency. Additional ethical screens may also need to be implemented where supervisors above Kevin Cmelik or Thomas Ferguson have taken some part in a prosecution of a pending contested case.

Finally, Mike's current duties in producing the Criminal Law Handbook and preparing and presenting training for PATC necessarily make him unavailable to act as alternate counsel at certain times during the year. We would suggest that when the ICRC requires legal advice that must be rendered during these times, that an alternative attorney be appointed to provide this advice, and that an ethical screen as described above be implemented. Please see attached suggested ethical screen documents to be executed in this matter.

STATEMENT OF DISQUALIFICATION AND SCREENING

I, Katie Fiala, state that I am disqualified from participation in rendering advice to the Iowa Civil Rights Commission (Commission) on pending cases before the Commission in contested cases that I am prosecuting. I acknowledge that an ethical screen is in place for these matters. Until final agency action is completed on these contested case matters, I agree to abide by the following: 1) I will not participate in any manner in providing legal advice to the Commission on these matters. 2) I will not review or access any files or documents rendering such advice in these matters other than those received by the parties in these matters in the normal course of adversarial proceedings 3) I will not communicate with any other employee of the Iowa Department of Justice with regard to legal advice provided to the Commission in this matter. 4) I will not communicate with Assistant Attorneys Generals Michael Bennett or Thomas Ferguson regarding Commission contested case matters.

All authority to provide legal advice to the Commission has been delegated to Assistant Iowa Attorney General Michael Bennett

Katie Fiala

Katie Fiala
Assistant Iowa Attorney General

Signed this 7th day of August, 2015

CC: Kevin Cmelik
Tom Ferguson, Mike Bennett
Conflict Resolution Committee

ACKNOWLEDGMENT OF DELEGATION, DISQUALIFICATION AND SCREENING

I, Michael Bennett, state that I have been delegated authority to provide the legal advice to the Iowa Civil Rights Commission (Commission) regarding pending contested case proceedings. I have been notified that Assistant Iowa Attorney General Katie Fiala is prosecuting these matters before the Commission and is thereby disqualified from rendering the Commission legal advice on these matters until final agency action is rendered in these matters. I acknowledge that an ethical screen is in place regarding these matters. I will not communicate with Katie Fiala regarding these matters. I will also not communicate with Katie Fiala's direct supervisor, Assistant Attorney General Kevin Cmelik, regarding these IRCR contested cases. All affected parties in these matters have been notified to direct communications in this matter to me.

Michael L. Bennett

Michael Bennett
Assistant Iowa Attorney General

Signed this 10th day of August, 2015
CC: Attorney's Supervisor

Katie Fiala, Kevin Cmelik

Conflict Resolution Committee

STATEMENT OF DISQUALIFICATION AND SCREENING

I, Kevin Cmelik, state that I am disqualified from participation in rendering advice to the Iowa Civil Rights Commission (Commission) on pending cases before the Commission in contested cases as I supervise Assistant Iowa Attorney General, Katie Fiala, who prosecutes these matters before the Commission. I acknowledge that an ethical screen is in place for these matters. Until final agency action is completed on these contested case matters, I agree to abide by the following: 1) I will not participate in any manner in providing legal advice to the Commission on these matters. 2) I will not review or access any files or documents rendering such advice in these matters other than those received by the parties in these matters in the normal course of adversarial proceedings. 3) I will not communicate with Assistant Iowa Attorney General Michael Bennett, who has been delegated to provide legal advice to the Commission, nor Assistant Iowa Attorney General Thomas Ferguson, who directly supervises Michael Bennett regarding these matters.

Kevin Cmelik

Kevin Cmelik, Director
Criminal Appeals Division

Signed this __ day of August, 2015

CC: Katie Fiala, Mike Bennett, Tom Ferguson
Conflict Resolution Committee

STATEMENT OF DISQUALIFICATION AND SCREENING

I, Thomas Ferguson, state that I am disqualified from participation in the investigation, prosecution, or advocacy of any contested case pending before the Iowa Civil Rights Commission (Commission) as I directly supervise Assistant Iowa Attorney General Michael Bennett, who advises the Commission in its role as adjudicator regarding these matters. I acknowledge that an ethical screen is in place for these matters. Until final agency action is completed on these contested case matters, I will not communicate with Assistant Iowa Attorney General Katie Fiala, who prosecutes these matters before the Commission, nor Assistant Iowa Attorney General Kevin Cmelik, who directly supervises Katie Fiala, with regard to matters prosecuted before the Commission.

Thomas Ferguson, Director
Prosecuting Attorney Training Coordinator Division

Signed this 10th day of August, 2015

CC: First Assistant Attorney General Kevin McCarthy,
Kevin Cmelik, Katie Fiala, Mike Bennett, Kevin C
Conflict Resolution Committee

In the Matter of Objection to ANTHONY BISIGNANO'S Candidacy for Iowa Senate District 17	)	DECISION OF ATTORNEY GENERAL TOM MILLER ON RECUSAL MOTION

On March 13, 2014, Ned Chiodo challenged the eligibility of candidate Anthony Bisignano for the office of state senator. The challenge was brought under Iowa Code section 43.24. Under this section, objections are determined by a three-person panel consisting of the Attorney General, Secretary of State, and Auditor of State. Iowa Code § 43.24(3)(a) (2013).

Objector Chiodo challenges candidate Bisignano's candidacy solely on the ground that Mr. Bisignano has been convicted of an aggravated misdemeanor. Mr. Chiodo asserts that conviction of an aggravated misdemeanor is an automatic ground to disqualify any Iowan from voting in any election or running for any office. Over 15,000 Iowans were convicted of an aggravated misdemeanor in 2012 alone. While the issue was raised with respect to a single candidate, the resolution of the issue directly impacts tens of thousands of Iowans. The issue is not unique to Mr. Bisignano, nor does resolution of the matter require any fact finding or consideration of any circumstance pertaining to Mr. Bisignano.

In his objection and in a separate Motion for Recusal of the Attorney General filed on March 17, 2014, Mr. Chiodo has asked that I step aside from my statutory duty and not participate in the resolution of this issue on three grounds:

First, Mr. Chiodo claims the issuance of formal opinions and informal advice by the Office of the Attorney General over a period of decades will compromise my ability to fairly and objectively apply the law. One of the express duties of the Attorney General is to provide opinions and advice on the law to public officials. Iowa Code § 13.2(e). Preexisting opinions or advice by the Office of the Attorney General on a matter of law does not disqualify the Attorney General from participating on the panel any more than the issuance of prior rulings would disqualify a judge or justice from reexamining or reapplying the law in a subsequent case. *See* Iowa Code of Judicial Conduct, rule 51:2.11(A)(5) (taking a position in a court proceeding or opinion that appears to commit a judge to rule in a particular way is not disqualifying); *Liteky v. United States,* 510 U.S. 540, 555 (1994) (prior judicial rulings alone rarely constitute a valid basis to disqualify a judge); *Anstey v. Iowa State Comm. Com'n*, 292 N.W.2d 380, 390 (Iowa 1980) (prior public statement on a matter of policy does not itself disqualify quasijudicial decision maker); *State v. Smith*, 242 N.W.2d 320, 324 (Iowa 1976) (a judge's "definite views on the law" do not constitute personal bias requiring recusal).

Second, Mr. Chiodo points to a Facebook posting that suggests Mr. Bisignano received information from my office regarding the voter and candidate eligibility of persons convicted of aggravated misdemeanors. No such communications were made personally by me. Mr. Bisignano, Mr. Chiodo, and many other members of the public have access to the formal and informal opinions and advice letters of this office. Mr. Chiodo has cited some and attached others to his objection. Public access to these records is not a ground for recusal.

Finally, he claims that I should recuse myself from performing the duties of the Office of Attorney General because a staff member of the office, Assistant Attorney General Nathan Blake, has declared his candidacy for the office in the same senate district. Mr. Chiodo cites in support *Bluffs Development Company, Inc. v. Board of Adjustment*, 499 N.W.2d 12 (Iowa 1993) (while quasijudicial administrative officers should be free of familial or pecuniary interests in a matter, remote or speculative interests are not disqualifying).

I have carefully considered this argument and have concluded that Mr. Blake's candidacy does not require disqualification. The sole statutory basis for disqualification is a challenge to a panel member's "nomination petition, certificate of nomination, or eligibility. . ." Iowa Code § 43.24(3)(a). The Attorney General, Secretary of State, and Auditor of State may not participate on a panel to decide his or her own eligibility. Here, neither I nor Mr. Blake is a party to the objection. Mr. Blake is not related to me outside of his employment status. Mr. Chiodo passes on media speculation about whether Mr. Bisignano's candidacy hurts or helps Mr. Blake, but provides no basis to support an actual or apparent conflict of interest for me or my office more generally.

Whatever interest Mr. Blake may have in the outcome of Mr. Chiodo's objection, that interest is personal to Mr. Blake and would not be imputed to me. There are over 200 employees of the Attorney General's office. Imputing potential conflicts of staff members to the Attorney General would severely impair the functioning of the office and the Attorney General's ability to serve as an elected official. The Office of Attorney General is conferred duties under the Constitution and statutes that are not shared by private lawyers. Given the special role of government lawyers, conflicts personal to

individual government lawyers are generally not imputed to those with whom they are associated in a government agency. *See* Iowa Rules of Professional Conduct, chapter 32, Preamble, cmt 18 & rule 32:1.11, cmt 2. *See also People v. Waterstone*, 783 N.W.2d 314 (2010) (reversed court of appeal's disqualification of the office of attorney general in light of "accommodation of his unique constitutional and statutory status," (*citing and partially quoting Attorney General v. Michigan Pub. Serv. Com'n*, 625 N.W.2d 16 (Mich.Ct.App. 2000); *Humphrey on Behalf of State v. McLaren*, 402 N.W.2d 535, 542-43 (Minn. 1987) (disqualification of assistant attorney general is not imputed to the entire office of attorney general).

Importantly, the issue at stake is a pure matter of law with widespread and identical collateral consequences to tens of thousands of Iowans and potentially to the conduct of elections by all state and local authorities for decades to come. Protecting the right to vote and hold office is a fundamental state interest. Unless disqualification is mandated by law, the Attorney General, as the constitutionally elected official under statutory duty to serve, should so serve.

In an abundance of caution, my office erected an ethical wall to screen Nathan Blake and the treasurer of his campaign Jessica Whitney, also an assistant attorney general, from any communications with anyone else in the office about Mr. Chiodo's objection and matters related thereto. The screen was put into place verbally on Friday, March 14, 2014, confirmed in writing on March 17, 2014, and distributed on March 17, 2014 to those members of the office connected in any way with consideration of the objection along with all office deputies and division directors to assure office wide coverage. I've attached the Precautionary Screen as Exhibit A. Mr. Blake and Ms.

Whitney are in the Consumer Protection Division of the Attorney General's office with no electronic access to the electronic work product of other divisions. No member of the Consumer Protection Division has participated in a matter related to Mr. Chiodo's objection.

I have carefully considered Mr. Chiodo's request that I recuse myself. I have concluded that I will serve on the panel in conformity with Iowa Code section 43.24(3)(a).

T. Miller

Attorney General Tom Miller

March 19, 2014

Date

Enc. Precautionary Screen, March 17, 2014

Precautionary Screen

March 17, 2014

On March 13, 2014, Ned Chiodo challenged the eligibility of candidate Anthony Bisignano for the office of state senator. The challenge was brought under Iowa Code section 43.24. Under this section, objections are determined by a three-person panel consisting of the Attorney General, Secretary of State, and Auditor of State. Iowa Code § 43.24(3)(a) (2013).

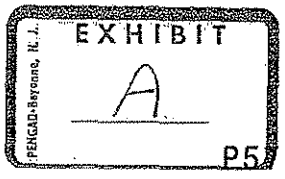
Objector Chiodo challenges candidate Bisignano's candidacy solely on the ground that Mr. Bisignano has been convicted of an aggravated misdemeanor. Mr. Chiodo asserts that conviction of an aggravated misdemeanor is an automatic ground to disenfranchise any Iowan from voting in any election or running for any office. While the issue was raised with respect to a single candidate, the resolution of the issue directly impacts tens of thousands of Iowans. The issue is not unique to Mr. Bisignano, nor does resolution of the matter require any fact finding or consideration of any circumstance pertaining to Mr. Bisignano.

Mr. Chiodo has asked that Attorney General Tom Miller step aside from his statutory duty and not participate in the resolution of this issue on two grounds:

First, Mr. Chiodo claims the issuance of formal opinions and informal advice by the Office of the Attorney General over a period of decades will compromise General Miller's ability to fairly and objectively apply the law. One of the express duties of the Attorney General is to provide opinions and advice on the law to public officials. Iowa Code § 13.2(e) (2013). Pre-existing opinions or advice by the office of the Attorney General on a matter of law does not disqualify the Attorney General from participating on the panel any more than the issuance of prior rulings would disqualify a judge or justice from re-examining or reapplying the law in a subsequent case. Mr. Chiodo cites no authority for this assertion and none exists. *See*, Iowa Code of Judicial Conduct, Rule 51:2.11(A)(5) (taking a position in a court proceeding or opinion that appears to commit a judge to rule in a particular way is not disqualifying); *Liteky v. U.S.*, 510 U.S. 540, 555 (1994)(prior judicial rulings alone rarely constitute a valid basis to disqualify a judge); *Anstey v. Iowa State Commerce Commission*, 292 N.W.2d 380, 390 (Iowa 1980)(prior public statement on a matter of policy does not itself disqualify quasi-judicial decisionmaker); *State v. Smith*, 242 N.W.2d 320, 324 (Iowa 1976) (a judge's "definite views on the law" do not constitute personal bias requiring recusal).

Second, he claims that General Miller is disqualified from performing the duties of the office because a staff member of the office, Assistant Attorney General Nathan Blake, has declared his candidacy for the office in the same senate district. Mr. Chiodo cites in support *Bluffs Development Company, Inc. v. The Board of Adjustment of Pottawattamie County*, 499 N.W.2d 12 (Iowa 1993)(while quasi-judicial administrative officers should be free of familial or pecuniary interests in a matter, remote or speculative interests are not disqualifying).

General Miller has carefully considered this argument and has concluded that Mr. Blake's candidacy does not require disqualification. The sole statutory basis for disqualification is a



challenge to a panel member's "nomination petition, certificate of nomination, or eligibility. . ." Iowa Code § 43.24(3)(a). The Attorney General, Secretary of State, and Auditor of State may not participate on a panel to decide his or her own eligibility. Here, neither General Miller nor Mr. Blake is a party to the objection. Mr. Blake is not related to General Miller outside of his employment status. Mr. Chiodo passes on media speculation about whether Mr. Bisignano's candidacy hurts or helps Mr. Blake, but provides no basis to support an actual or apparent conflict of General Miller.

Whatever interest Mr. Blake may have in the outcome of Mr. Chiodo's objection, that interest is personal to Mr. Blake and would not be imputed to General Miller. There are over 100 employees of the Attorney General's office. Imputing potential conflicts of staff members to the Attorney General would severely impair the functioning of the office and the Attorney General's ability to serve as an elected official. The Office of Attorney General is conferred duties under the constitution and statutes that are not shared by private lawyers. Given the special role of government lawyers, conflicts personal to individual government lawyers are generally not imputed to those with whom they are associated in a government agency. *See*, Iowa Rules of Professional Conduct, Chapter 32, Preamble, comment 18, and Rule 32:1.11, comment 2. *See, also, People v. Waterstone*, 486 Mich. 942, 783 N.W.2d 314 (2010)(reversed court of appeal's disqualification of the office of attorney general in light of "accommodation of his unique constitutional and statutory status," *citing and partially quoting, Attorney General v. Michigan Public Service Com'n*, 243 Mich.App 487, 506, 625 N.W.2d 16 (Mich.App. 2000); *Humphrey on Behalf of State v. McLaren*, 402 N.W.2d 535, 542-43 (Minn. 1987) (disqualification of assistant attorney general is not imputed to the entire office of attorney general)

Importantly, the issue at stake is a pure matter of law with widespread and identical collateral consequences to tens of thousands of Iowans and potentially to the conduct of elections by all state and local authorities for decades to come. The right to vote and hold office is a fundamental state interest. Unless disqualification is mandated by law, the Attorney General, as the constitutionally elected official under statutory duty to serve, should so serve.

We have concluded there is no actual conflict or appearance of conflict that compels General Miller's disqualification. In an abundance of caution, we have erected an ethical screen to shield Mr. Blake and the treasurer of his campaign Jessica Whitney from others in the office. Mr. Blake and Ms. Whitney have confirmed verbally on March 14, 2014, and in writing below that they will not have any communication with anyone in our office about Mr. Chiodo's objection and matters related thereto. We are sending this notice to all staff in the office of the Attorney General to assure each of you will refrain from having any communication with Nathan Blake or Jessica Whitney about Mr. Chiodo's objection and matters related thereto. Until this objection has been resolved, Mr. Blake and Ms. Whitney will have no access to any paper or electronic files on these matters.

If in doubt as to whether a particular communication or matter may be covered by the screen, please consult with Chief Deputy Eric Tabor or Solicitor General Jeffrey Thompson.

I have read this Precautionary Screen and shall abide by its terms.

Nathan Blake — Date: 3/17/14

Jessica Whitney — Date: 3/17/14

M E M O R A N D U M

TO: Division Directors

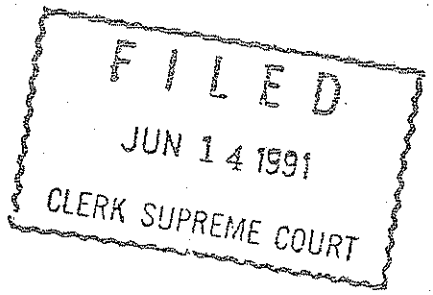
FROM: Elizabeth M. Osenbaugh EMO

RE: Attorney General's office -- conflicts screening

DATE: June 20, 1991

Attached is the Supreme Court's order in National Dietary Research reversing Judge Ryan's decision which had disqualified the entire office because one assistant attorney general previously represented the defendant. The order reflects that our screening procedures adequately protect against the existence of actual conflict, sharing of secrets, etc. We will, therefore, continue those procedures as set out in our prior memorandum. If you need copies, please contact Melanie or Ray Johnson.

AD



IN THE SUPREME COURT OF IOWA

No. 91-607

Polk County No. CE30-17366

O R D E R

STATE OF IOWA, ex rel., THOMAS J. MILLER, ATTORNEY GENERAL OF IOWA, and IOWA BOARD OF PHARMACY EXAMINERS,
Plaintiffs-Appellants,

vs.

NATIONAL DIETARY RESEARCH, INC., WILLIAM H. MORRIS CO., d/b/a OMICRON INTERNATIONAL, WILLIAM MORRIS, MIKE LEVERSO, J.P. ENTERPRISES, PATRICIA PENROD and JAMES PENROD,
Defendants-Appellees.

This matter comes before the court, Larson, Carter, and Andreasen, JJ., upon plaintiffs' combined third application for interlocutory appeal, application for stay, motion to reverse and request for related relief.

On April 24, 1991, we entered a temporary stay of the district court's order disqualifying the Iowa attorney general's office from representing the State in this case. The defendants subsequently filed a resistance to plaintiffs' application for interlocutory appeal with supporting exhibits. The plaintiffs have filed a reply to this resistance.

The plaintiffs seek review of the order disqualifying the Iowa attorney general's office from representing the

plaintiffs in this case on the basis of the appearance of impropriety consisting of the office hiring a former counsel of the defendants. The district court determined that the measures taken to screen the former counsel from this case were inadequate to cure the appearance of impropriety. We conclude that these measures were sufficient and that the district court abused its discretion in disqualifying the entire Iowa attorney general's office in the circumstances of this case. See Richers v. Marsh & McLennan Group Assoc., 459 N.W.2d 478, 481 (Iowa 1990).

Accordingly, the State's application for interlocutory appeal is granted. The district court's order entered on April 18, 1991, disqualifying counsel if hereby reversed. This order is without prejudice to the district court granting future relief to the defendants if the preventative measures taken by the attorney general's office become ineffective to screen the defendants' former counsel from this case.

Dated this 14th day of ~~May~~ June, 1991.

THE SUPREME COURT OF IOWA

By _____
J.L. Larson, Justice

IN THE SUPREME COURT OF IOWA

STATE OF IOWA ,ex rel. THOMAS J. MILLER, ATTORNEY GENERAL OF IOWA, and IOWA BOARD OF PHARMACY EXAMINERS,	)	Supreme Court No._____
Plaintiffs,	)	MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION AND APPLICATION FOR SUPERVISORY ORDER AND FOR STAY OR ALTERNATIVELY, APPLICATION FOR PERMISSION TO APPEAL IN ADVANCE OF FINAL JUDGMENT, MOTION TO REVERSE AND FOR STAY
vs.		
NATIONAL DIETARY RESEARCH, INC., et al.,		
Defendants,		

Appellant State of Iowa ex rel. Bonnie Campbell and the Iowa Board of Pharmacy Examiners (the State) submit this Memorandum in support of its request for stay of the April 18, 1991 ruling issued by the Honorable Rodney J. Ryan of the Polk County District Court.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff, State of Iowa ex rel. Thomas J. Miller, Attorney General, and the Iowa Board of Pharmacy Examiners, initiated this action on August 10, 1988, against the defendants alleging violations of Iowa Code § 714.16 (1987), commonly known as the Iowa Consumer Fraud Act, and Iowa Code chapter 203A, commonly known as the Iowa Food, Drug, and Cosmetic Act. The State alleges that defendants have sold a "diet pill" in Iowa by using false or deceptive advertising and that defendants' diet pill is a misbranded, unapproved new drug being sold in violation of the Consumer Fraud Act and the Iowa and federal Food, Drug and Cosmetic Acts.

On or about October 20, 1989, the State of Iowa filed its first Application to Appeal in Advance of Final Judgment on several discovery issues. That application was granted by this Court. S. Ct. No. 89-1581. On April 18, 1990, this Court issued its ruling on that appeal, reversing many of the trial court's discovery rulings. See State of Iowa v. National Dietary Research, Inc., 454 N.W.2d 820 (Iowa 1990).

This matter proceeded to trial on December 17, 1990. On the second day of trial the State called Mike Verdi, designated by the United States Food and Drug Administration to testify as to the Food and Drug Administrations position regarding FS-1. The State also attempted to introduce through Mr. Verdi an affidavit from the FDA and a regulatory letter from the FDA to Defendant William Morris which stated that FS-1 was an unapproved new drug being illegally sold and requesting that Defendant Morris recall the product. After hearing that the FDA had issued a regulatory letter to the defendants, Judge Ryan concluded that he could not make a fair and impartial determination of whether FS-1 was a "drug" and that the trial should be stayed pending final resolution of all matters with the FDA.

The State then requested that the lower court reconsider its ruling staying the trial. On March 4, 1991, the lower court denied the State's Motion to Reconsider. On April 3, 1991 the State filed a Second Application to Appeal in Advance of Final Judgment. This Court has not yet ruled on the State's Second Application.

Assistant Attorney General Ray Johnson has represented the State throughout the entire investigation and litigation of this matter. Pam Griebel was one of several attorneys for defendants J.P. Enterprises, Pat Penrod and James Penrod. The Penrods also have been and are now being represented by Larry Scalise, Mike Lacey and Mark Roeder. On or about February 26, 1991, Pam Griebel accepted a position with the Consumer Protection Division of the Attorney General's Office. Assistant Attorney General Ray Johnson did not initiate contact with Ms. Griebel about any job possibilities with the Attorney General's Office and was not aware that Ms. Griebel was even interested in such a position until her application was discovered during a review of applications for an open position in the Consumer Protection Division. Pam Griebel's first day of work in the Attorney General's Office was April 1, 1991.

Immediately after Pam Griebel was hired and prior to her first day of work, extensive measures were implemented by the Attorney General's Office to ensure and protect any secrets or confidences of defendants' and to avoid any actual impropriety or the appearance of impropriety. See Affidavit of Marjorie Leeper attached as Exhibit 1, which was made part of the district court record by stipulation of the parties. As stated in the Leeper Affidavit, a memo was circulated to all employees of the Consumer Protection Division directing them not to discuss the National Dietary Research Case with or in the presence of Pam Griebel. Ms. Griebel does not have access to any of the case or

investigatory files and her office is not in proximity to the investigators or attorneys working on the National Dietary Research case. All of the Consumer Protection Division staff members including Ms. Griebel were required to sign a memo that they had received, read and understood the memo regarding Ms. Griebel and the National Dietary Research case.

At the disqualification hearing in the district court, Investigator Leeper was present and was made available to defendants counsel for cross examination. Defendants counsel waived cross examination and stipulated to the veracity of Investigator Leeper's affidavit. Defendants' counsel stated that the integrity of the attorneys involved was not being questioned, rather it was the appearance of impropriety that was at issue.

Judge Ryan then ruled from the bench that Assistant Attorney General Ray Johnson and the entire Attorney General's Office would be disqualified from representing the State in this matter. Judge Ryan further ruled that in any consultations between the Attorney General's Office and outside counsel could only take place in the presence of defendants' counsel to ensure that the Attorney General's Office was not still directing the litigation.

PROCEDURE FOR REVIEW

The State believes that the lower court ruling can be reviewed by a Petition for Writ of Prohibition and Application for Supervisory Order pursuant to Iowa Rules of Appellate Procedure 22(a) and (e). Disqualification orders have also been

reviewed by certiorari, Killian v. Iowa District Court for Linn County, 452 N.W. 2d 426, (Iowa 1990) and application for interlocutory appeal, Richers v. Marsh & McLennan Group, 459 N.W. 2d 478, 481 (Iowa 1990), or a writ of mandamus and/or prohibition Summit v. Mudd, 679 S.W. 2d 225 (Kentucky 1984). If the court concludes that a Petition for Writ of Prohibition and Application for Supervisory Order is not the proper vehicle for review of the district court ruling, the State requests that pursuant to Iowa Rule of Appellate Procedure 304, its Petition be treated as a application for permission to appeal in advance of final judgment and motion to reverse pursuant to Iowa Rules of Appellate Procedure Rules 2 and 22(c), or a petition for writ of certiorari pursuant to Iowa Rule of Appellate Procedure 301.

SCOPE OF REVIEW

The scope of review in an attorney disqualification case is abuse of discretion. Richers v. Marsh & McLennan Group, 459 N.W. 2d 478, 481 (Iowa 1990). An abuse of discretion will be found if the district court exercises its discretion on grounds or for such reasons clearly untenable or to an extent clearly unreasonable. State of Iowa ex rel. Miller v. National Dietary Research, Inc., et al., 454 N.W. 2d 820, 822 (Iowa 1990). An abuse may arise from an erroneous conclusion and judgment of the court. Richers at 481.

ARGUMENT

1. The district court abused its discretion by disqualifying counsel for the State and the entire Attorney General's Office.

The district court abused its discretion by concluding that because attorney Pam Griebel had a conflict of interest and could not represent the State in this matter, Assistant Attorney General Ray Johnson and the entire Attorney General's Office likewise should be disqualified.

Before Pam Griebel began work in the Attorney General's Office, the State recognized that Pam Griebel would have a conflict of interest and would not be permitted to work on the National Dietary Research case. As shown by the Affidavit of Marjorie Leeper attached as Exhibit 1, extensive screening measures were put in place at the Attorney General's Office to avoid any appearance of impropriety and to ensure that any confidences and secrets of the defendants would not be shared with anyone at the Attorney General's Office. Defendants' counsel conceded in the district court that they were not contending that any actual secrets had been revealed, but rather it was the appearance of impropriety that warranted the disqualification of the entire office.

Since it is undisputed that no secrets or confidences of the defendants have been shared with the State, disqualification of counsel for the State and the entire Attorney General's Office necessarily rests on the theory of "vicarious disqualification" or "imputed knowledge." Vicarious disqualification is the notion that if one member of a law firm is disqualified, all members are

vicariously disqualified." See Iowa Code of Professional Responsibility DR 5-105(E).

Vicarious disqualification and imputed knowledge has been limited as it applies to private firms, and rejected in the context of government law offices. Chadwick v. Superior Court for the County of Santa Barbara, 164 Cal. Rptr. 864, 868, 106 Cal. App. 3d 108 (Cal. App. 1980). In a formal opinion, the ABA standing Committee on Ethics and Professional Responsibility concluded that the parallel ABA rules, DR 5-105(D) and related rules, were inapplicable to government lawyers. Id. The ABA Opinion stated:

> When the Disciplinary Rules of Canons 4 and 5 mandate the disqualification of a government lawyer who has come from private practice, his governmental department or division cannot practicably be rendered incapable of handling even the specific matter. Clearly, if DR 5-105(D) were so construed, the government's ability to function would be unreasonably impaired. Necessity dictates that government action not be hampered by such a construction of DR 5-105(D). The relationships among lawyers within a government agency are different from those among partners and associates of a law firm. The salaried government employee does not have the financial interest in the success of departmental representation that is inherent in private practice. This important difference in the adversary posture of the government lawyer is recognized by Canon 7: the duty of the public prosecutor to seek justice, not merely to convict, and the duty of all government lawyers to seek just results rather than the result desired by a client. The channeling of advocacy toward a just result as opposed to vindication of a particular claim lessens the temptation to circumvent the disciplinary rules through the action of associates. Accordingly, we construe DR 5-105(D) to be inapplicable to other government lawyers associated with a particular government lawyer who is himself disqualified by reason of Dr 4-101, DR 5-105, DR 9-101(B), or similar Disciplinary Rules. Although vicarious disqualification of a government department is not necessary or wise, direct or indirect participation in the matter, and discussion with his colleagues concerning the relevant

> transaction or set of transactions is prohibited by those rules.

Formal Opinions 342, The ABA Committee on Ethics and Professional Responsibility issued November 24, 1975, 62 ABA J. 517, 521, April 1976.

Courts have generally followed Formal Opinion 342. see Pisa v. Commonwealth, 393 N.E.2d 386, 389, (Mass. 1979) (and cases cited therein) ("Where a lawyer who has represented a criminal defendant joins a prosecutor's office, disqualification of the entire office is not necessarily appropriate . . . . [I]ndividual rather than vicarious disqualification is the general rule"); Chadwick v. Superior Court, 106 Cal.App.3d 108, 115, 164 Cal.Rptr. 864, 868-871 (1980) (and cases cited therein) (overwhelming weight of national authority rejects recusal of entire government office on theory of imputed knowledge); State v. Tippecanoe County Court, 432 N.E.2d 1377, 1379 (Ind. 1982) ("Where a lawyer who has represented a criminal defendant on prior occasions is one of the deputy prosecutors, disqualification of the entire office is not necessarily appropriate").

The mere possibility of the appearance of impropriety is not sufficient to disqualify the entire staff of an attorney general. Summit v. Mudd, 679 S.W.2d 225 (Ky. 1984). Actual prejudice must be shown to disqualify. Id. It is wrong to automatically assume that a lawyer who represented a client as a Public Defender will violate the very strong ethical considerations of attorney/client

confidentiality. Id. at 226. And see Chadwick at 869 (court declines to disqualify entire prosecutors office on fiction that information is deemed to have been shared when court knows that information has not been shared).

In U.S. v. Goot, 894 F.2d 231 (7th Cir. 1990), the court applied a three-part test to determine whether disqualification of the entire U.S. Attorney's office is necessary when an attorney has switched from one side to another. First, does a "substantial relationship" exist between the subject matter of the prior and present representations? Second, if so, has the presumption of shared confidences with respect to the prior representation been rebutted? Third, if not, has the presumption of shared confidences with respect to the present representation been rebutted? Id. at 235. Disqualification is required when screening devices were not employed or were not timely employed. Id.

In the present case, there is no dispute at all as to any of the elements of the test. The State concedes the first two parts of the test. There is a substantial relationship between Pam Griebel's representation of the defendants and the State's action against the defendants. The State also concedes that Pam Griebel would probably have knowledge of secrets and confidences of the defendants. With respect to part three however, the State has rebutted beyond any doubt any presumption of shared confidences of the defendants' with respect to the National Dietary Research case between Pam Griebel and any other employee of the Attorney

General's Office involved in this litigation. Defendants admit that they do not contend that any confidences or secrets have been shared and they have no quarrel with the factual statements contained in the Leeper Affidavit relating to screening devices implemented by the Attorney General.

Therefore, there is no basis for disqualifying Assistant Attorney General Ray Johnson or anyone else at the Attorney General's Office other than Pam Griebel, who has been screened from the case in any event. The district court ruling to the contrary is an abuse of discretion and must be reversed.

2. The lower court abused its discretion in requiring the presence of defense counsel during any discussions between the Attorney General's Office and outside counsel.

The district court's ruling provides for defense counsel to be present during communications between the Attorney General's Office and any outside counsel the State retains to pursue this litigation. Even if the Court were to find no abuse of discretion as to the disqualification of the entire Attorney General's Office, this portion of the ruling is clearly untenable.

In an effort to avoid the appearance of impropriety as to defendants' secrets and confidences, the lower court has allowed defendants' counsel to be present while the State discusses with its counsel a wide range of subjects including litigation strategy and work product. The order clearly invades the attorney-client privilege and allows defendants to freely obtain confidences the State may want to share with its attorney. For

example, it would be impossible to discuss with outside counsel the status of direct and cross examination of witnesses, strengths and weaknesses of the case, or settlement posture with defendants' counsel present. This portion of the lower court ruling is a clear abuse of discretion.

CONCLUSION

For all of the reasons stated herein, the State requests that this Court vacate and/or stay the lower court's ruling disqualifying counsel for the State and the entire Attorney General's Office. Alternatively, the State requests that this Court vacate and/or stay the portion of the district court ruling permitting defendants' counsel to be present during discussions between counsel for the State and outside counsel.

Respectfully submitted,

RAY JOHNSON
Assistant Attorney General
Consumer Protection Division
1300 East Walnut
Hoover Building, 2nd Floor
Des Moines, IA 50319
Telephone: (515) 281-5926

Attorney for Plaintiff

CERTIFICATE OF SERVICE

I, Ray Johnson, hereby certify that I served this Petition for Writ of Prohibition and Application for Supervisory Order or, Alternatively, Application for Permission to Appeal in Advance of Final Judgment by first class mail on Defendants' counsel at the following addresses.

_____
Ray Johnson

Dan Jacobi
1010 Insurance Exchange Building
505 Fifth Avenue
Des Moines, IA 50309

Larry Scalise
Scalise, Scism & Uhl
2910 Grand Avenue
Des Moines, IA 503122

Mike Lacey, Jr.
729 Insurance Exchange Building
Des Moines, Iowa 50309

M E M O R A N D U M

TO: Steve St. Clair, Ray Johnson, Pam Griebel

FROM: Elizabeth M. Osenbaugh EMO

RE: State v. National Dietary Research

DATE: April 29, 1991

The conflicts committee met and concurred that the procedure set out in the prior memoranda should be followed and the issues concerning vicarious disqualification litigated.

STATE OF IOWA

DEPARTMENT OF JUSTICE

OFFICE OF THE ATTORNEY GENERAL

CONSUMER PROTECTION DIVISION

AFFIDAVIT

STATE OF IOWA)
)
COUNTY OF POLK)

IN RE
STATE OF IOWA v. NATIONAL DIETARY RESEARCH, INC., ET AL.

I, Marjorie A. Leeper, being first duly sworn on oath, do state and depose that the following is true to the best of my knowledge and belief.

I am employed as the chief investigator with the Iowa Department of Justice, Consumer Protection Division, Hoover Building, Des Moines, Iowa 50319. I have been an investigator with the Division since 1983 and chief investigator since 1986.

I was informed in March 1991 our office hired attorney, Pam Griebel, as an assistant attorney general to begin work in our Consumer Protection Division April 1, 1991. Ms Griebel had been counsel for defendants, J. P. Enterprises, Pat Penrod and James Penrod in the State of Iowa v. National Dietary Research Inc., et al., a case prosecuted by the Consumer Protection Division and stayed by the Polk County Court pending a decision by the Federal Drug Administration in an administrative proceeding. I had

assisted Assistant Attorney General Ray Johnson in the trial of National Dietary Research.

In anticipation of Ms. Griebel's employment in the Consumer Protection Division, extensive measures and policies were implemented and will continue to be implemented to ensure and protect secrets and confidences of the defendants and to avoid any actual or appearance of impropriety.

On March 12, 1991 a memo drafted by Ray Johnson and me (See exhibit A attached) was circulated to all Consumer Protection Division staff members, including secretaries, volunteers, law clerks and interns and to Ms. Griebel upon visiting the office prior to her employment.

The memo explained the situation surrounding Ms. Griebel's employment with our office and her recent employment as a defense attorney on a case prosecuted by our office, yet still pending. The memo directed Ms. Griebel not to discuss any thing with any one at our office regarding National Dietary or any other related matters. Staff members were directed not to discuss the National Dietary case with Ms. Griebel or in her presence. Ms. Griebel would not have access to any files pertaining to the case. In addition, her office space is not in the vicinity of any of the investigators or attorneys working on the National Dietary case. She, therefore, would not be privy to any phone conversations or planning meetings regarding the National Dietary case.

On March 13 each Consumer staff member, including Ms. Griebel, was asked to sign a memo that they had received, read and understood the memo of March 12 regarding Ms. Griebel and the National Dietary case. (See exhibit b attached.)

Since Ms. Griebel's employment with our office on April 1, 1991, the above detailed measures have been implemented. The National Dietary case has not and will not be discussed with Pam Griebel or in her presence nor will she have access to any case files, litigation files or any other documents or materials relating to the case.

New staff members will be informed of the arrangement with Ms. Griebel and requested to sign a form indicating they too have received, read, and understood the March 12, 1991 National Dietary Research and Pam Griebel memo.

The policies in place regarding this matter will be strictly enforced.

Further affiant sayeth not.

Marjorie A. Leeper

Marjorie A. Leeper

Subscribed and sworn to me this 4th day of April, 1991.

NOTARY PUBLIC

- IMPORTANT -

PLEASE READ PRIOR TO OUR WEDNESDAY LUNCH WITH PAM GRIEBEL

M E M O

TO: All Consumer Protection Division Staff

FROM: Ray Johnson, Marjorie Leeper

DATE: March 12, 1991

RE: National Dietary Research (NDR) / Pam Griebel

As you are aware, Pam Griebel will be joining our Division as an attorney. Several of us have worked with Pam in the past and we look forward to working with her as an employee of the Consumer Protection Division.

In private practice, Pam represented several defendants in the National Dietary Research case before Judge Ryan. This case is currently in litigation and it is not anticipated that it will be resolved in the near future.

To avoid any actual or apparent conflict of interest, Pam will not discuss the National Dietary Research matter with anyone in the Consumer Protection Division or the Attorney General's Office. She will also not be involved in any discussions or any other matter related to the case. Additionally, all members of the Consumer Protection Division staff are directed to refrain from discussing the National Dietary Research case with Pam, or in her presence. Pam will not have access to any files pertaining to National Dietary Research.

It is very important that this policy be strictly adhered to in order to avoid any appearance of impropriety or the disqualification of our office from participating in litigation of the case.

Thank you for your cooperation. If you have any questions, see one of us.

EXHIBIT a P79

M E M O R A N D U M

TO: CPD Staff

FROM: Marjorie A. Leeper, Investigator

DATE: March 13, 1991

RE: National Dietary Research (NDR)/Pam Griebel Memo

Attached is the Griebel/NDR memo which was circulated March 12. Each person in the Division needs to initial and date this memo indicating he/she received, read and understood the Griebel/NDR memo for documentation purposes.

DATE

3/13-91 Pam Griebel

3-13-91 SSX Steve St. Clair

3-13-91 RJ Ray Johnson

3-13-91 BB Bill Brauch

3-[illegible] Peter Kochenburger

3-13-91 Norman Norland

[illegible] Marjorie Leeper

3-13-91 Deb Moore

3/13/91 Lise Ludwig

3/13/91 Holly Merz

3-13-91 CB Carmel Benton

3/13/91 SES Steve Switzer

3-15-91 BW Barb White

3-13-91 C Chet Culver

3-18 91 Bob Reiber

3-13-91 MR Marilyn Rand

[illegible] Jan Bloes

3/13/91 Kathy Gray

3-13-91 Sandy Kearney

3-13-91 Diane Dunn

3-13-91 Edie Omlie

3/13/91 Randy Tenz

Jennifer Bradley

3-13-91 Jean Chartier

EXHIBIT b P80

115 Yale L.J. 2446

Yale Law Journal
Symposium 2006

The Most Dangerous Branch? Mayors, Governors, Presidents, and the Rule of Law: A Symposium on Executive Power
Essays

BREAK UP THE PRESIDENCY? GOVERNORS, STATE ATTORNEYS GENERAL, AND LESSONS FROM THE DIVIDED EXECUTIVE

William P. Marshall[a1]

ABSTRACT. Proponents of the unitary executive have contended that its adoption by the framers "swept plural executive forms into the ash bin of history." Virtually every state government, however, has a divided executive in which executive power is apportioned among different executive officers independent of gubernatorial control. Focusing on the Office of the State Attorney General, this Essay examines the state experience with the divided executive and demonstrates that the model of an independent attorney general has proved both workable and effective in providing an intrabranch check on state executive power. The Essay then discusses the potential application of the model of the divided executive at the federal level. For a number of reasons, there has been a dramatic expansion of presidential power in the last half century with the result that Congress and the courts are often no longer able to constrain executive power in a timely and effective manner. In such circumstances, the only possible check on presidential power must come from within the executive branch. Yet the ability of the Federal Attorney General to provide such a check is, at best, illusory because, under the structure of the unitary executive, the Attorney General is subject to presidential control. Accordingly, the Essay questions whether the federal government should borrow from the state experience and make the Attorney General an independent officer.

*2447 ESSAY CONTENTS

*2448 INTRODUCTION

Proponents of the federal unitary executive have contended that its adoption by the Framers "swept . . . plural executive forms into the ash bin of history."[1] The federal model, however, has not been embraced by the states. The states, rather, employ a divided executive that apportions executive power among different executive officers not subject to gubernatorial control.[2] In forty-eight states, for example, the Attorney General does not serve at the will of the Governor;[3] and in many states, other executive branch officers such as the Secretary of State, Treasurer, and Auditor are also independent.[4]

The divided executive holds the theoretical advantages of dispersing power and serving as a check against any particular officer's overreaching, virtues that might be seen as particularly appealing given concerns about executive branch excesses at the federal level. But the structure also potentially undermines the virtues of energy and efficiency, political accountability, and separation of powers that the Framers of the Federal Constitution associated with the unitary executive model. The question then arises as to whether the divided executive provides a viable and workable model for executive power implementation.

Focusing on the Office of the Attorney General, this Essay examines the divided executive. Part I examines the state experience. It provides a brief discussion of the history and evolution of the Office of the Attorney General, explores how the divided executive works in practice, and canvasses the cases that address how conflicts between governors and state attorneys general are resolved. Part I concludes that the divided executive model can foster an intrabranch system of checks and balances without undercutting the ability of the executive branch to function effectively. Part II then probes the question of *2449 whether the federal government should borrow from the state experience and make the Federal Attorney General an independent officer.[5] We live in an era of increasing (and, some would say, increasingly unchecked) presidential power. Part II accordingly considers whether the federal government should construct an intrabranch system of checks and balances, consistent with the state experience, in order to guard against executive branch excess.

I. THE STATE EXPERIENCE WITH THE DIVIDED EXECUTIVE: GOVERNORS AND STATE ATTORNEYS GENERAL

A. Common Law Origins of the Office of the Attorney General

The roots of the Office of the Attorney General date back to the thirteenth century, when English kings appointed attorneys to represent regal interests in each major court or geographical area.[6] Initially, the attorneys had limited powers, based either on the courts in which they appeared or the business that they were assigned to conduct.[7] During the Middle Ages, however, this practice was superseded by the appointment of a single attorney with broad authority, including the power to appoint subordinates to carry out his responsibilities.[8] The Attorney General emerged as chief legal adviser to the Crown and was often appointed for life tenure--a practice that continued until the reign of Henry VIII when it was changed to service at the pleasure of the Crown.[9]

Throughout the sixteenth and seventeenth centuries, the duties of the Attorney General continued to evolve and expand; with eminent tenants such as Edward Coke and Francis Bacon, the Office also continued to gain in prestige.[10] The Attorney General was often summoned by writ of attendance to the House of Lords where he was consulted on bills and points of law.[11] In 1673, he began to sit in the House of Commons, advising that body and ***2450** assisting in the drafting of legislation.[12] He also gave legal advice to the various departments of state and appeared for them in court.[13]

Importantly, during this period, the Attorney General established that his duty of representation extended to the public interest and not just to the ministries of government.[14] In fact, by 1757, the Attorney General was able to refuse "to prosecute or to stop a prosecution on the orders of a department of the government, if he disapproved of this course of action."[15] Accordingly, the Attorney General became less the government's lawyer and more an independent public official "responsible for justice."[16]

B. The State Attorneys General

The Office of the Attorney General was brought over to the colonies, where it was modeled after its English counterpart;[17] and at the time of the founding, it existed in all thirteen of the original states.[18] The terms of tenure varied considerably. North Carolina, for example, provided for a lifetime appointment by the legislature.[19] In New York, the Attorney General was appointed by the Governor with the advice and consent of an Executive Council but he could be impeached and removed from office for "mal and corrupt conduct" only by a two-thirds vote of those present in the Assembly.[20] Delaware allowed the Governor to appoint the Attorney General, upon confirmation by the Privy ***2451** Council, for a term of five years.[21] Rhode Island, alone among the original states, provided that the Attorney General would be popularly elected.[22]

The Framers of the Federal Constitution apparently placed the Attorney General under the control of the President,[23] thereby adopting the model of the unitary executive, at least insofar as they did not directly create separate federal officers independent of the President.[24] But the federal model proved to have very little influence over the development of state government. In fact, in the years following the ratification of the Federal Constitution, the states tended to reject the federal model because they were concerned with the concentration of too much power in one executive officer. Ohio, for example, in reaction to a territorial Governor who was perceived to be too autocratic, drafted its first state constitution in 1802 specifically to minimize the authority of the Governor by dispersing executive power over a range of independent executive branch officers.[25]

As the nation matured, many states created independent attorneys general and afforded the Office even greater autonomy by making it a popularly elected position. Again, the states' purpose was to weaken the power of a central chief executive and further an intrabranch system of checks and balances. Thus, the Minnesota Supreme Court observed, in reference to the state's 1851 constitution, that:

> Rather than conferring all executive authority upon a governor, the drafters of our constitution divided the executive powers of state government among six elected officers. This was a conscious effort on ***2452** the part of the drafters, who were well aware of the colonial aversion to royal governors who possessed unified executive powers.[26]

Accordingly, as the nineteenth century unfurled, most new states provided in their constitutions for the popular election of an attorney general (and other executive branch officials) while many of the established states amended their constitutions to the same end. As a result of this trend, at present, forty-three state attorneys general are elected and forty-eight are free from

gubernatorial control.[27] Notably, no state has reversed direction and made its Attorney General subservient to the Governor.[28]

The Office of the Attorney General has now evolved to have jurisdiction over a wide range of matters, although its specific powers vary considerably from state to state. In some states, for example, the Attorney General has statutory authority to bring consumer protection, environmental, civil rights, civil fraud, securities, and antitrust actions; some offices are also charged with maintaining oversight over public lands and charitable trusts.[29] Many state attorneys general have significant authority to investigate both governmental and non-governmental misconduct. Attorneys general also play an important role in criminal law enforcement, with some state offices having direct prosecutorial powers or supervisory authority over law enforcement officers.[30] Some state attorneys general additionally have broad common law powers to sue in the name of the public interest or in parens patriae.[31] Finally, in virtually all states, the Attorney General is designated the state's chief legal officer.[32] The problem, as shall be discussed, however, is that no matter how extensive the Attorney General's powers have become, they still must be reconciled with *2453 those of the Governor, who, in virtually every state, enjoys the even more expansive charge of assuring that the laws are faithfully executed.[33]

C. Governors and State Attorneys General

Not surprisingly, a divided executive creates substantial opportunities and incentives for conflict.[34] First, there are matters of simple politics. In states where the Governor and the Attorney General are independently elected, the two officers may come from different political parties with diametrically opposed partisan agendas. If so, they can be expected to be in constant political opposition to each other. Moreover, even when from the same party, the two officers can, and often are, divided by personal rivalries or ideological differences. And even when the two officers agree on a particular issue, they may compete with each other to be the most aggressive in addressing the issue to curry favor with a particular constituency.[35] Add to this the political reality that the Office of the Attorney General has long been seen by many of its occupants as a stepping stone to the Governor's office[36] and the blueprint for confrontation and conflict is manifest. Finally, disputes may occur because of the differing visions the officers may have concerning each other's roles. Governors tend to view attorneys general as subservient officers. But most attorneys general, while acknowledging some obligation to represent the Governor and the other parts of state government, tend to perceive their overriding obligation to be to the broader concerns of representing the state, the law, and the public interest.[37]

*2454 What is remarkable, then, in reviewing the state experience, is that debilitating conflict has not materialized. This is not to say that serious disputes have never occurred or that governors have never complained about having to deal with independent attorneys general (or vice versa). Certainly they have. And it is also true that the divided executive has occasionally been the target of reforms that would make the Attorney General subject to gubernatorial appointment and removal.[38] But history suggests that both governors and attorneys general have generally learned to cooperate effectively within a divided executive framework.

The reasons why cooperation, rather than conflict, has been the rule are not complex. On one side, the Governor, even if he believes he is unduly constrained by an attorney general's position, has the general incentive to comply because he may not want to be seen as defying the Attorney General on matters for which the public expects that the Attorney General, as chief legal officer, will have greater expertise. A Governor who rejects the Attorney General's position therefore risks expending political capital by appearing reckless, if not lawless. Moreover, he risks even greater vulnerability on that point if his legal position eventually fails in court.

On the other side, the Attorney General may also be restrained from overreaching because she is aware that her role is, in large part, defined by public expectations and that her primary obligation is to defend, not contradict, the policies of state officers or agencies, except when those policies violate the law.[39] Indeed, this understanding is so prevalent that virtually all of the state attorneys general have institutionalized it in in-house memoranda.[40]

Many of the more powerful incentives for cooperation, moreover, are mutual. To begin with, as repeat and interdependent players, both sides have the incentive to maintain a functioning relationship to ensure they can fulfill the duties of their respective offices. They may also feel significant political pressure to work together because it will be harmful to both if they are seen as unwilling or unable to work across political divides. The electorate, after all, does not tend to reward those who bring government to a standstill. Further, both sides may be motivated to come together because reaching internal consensus may fortify their actions against third parties. When both the Governor and the Attorney General agree that a course of action

is permissible, the authority behind that position is greater than when either party reaches *2455 that conclusion alone. Finally, and perhaps unduly idealistically, the Governor and Attorney General may be united by a common sense of duty. As one court has noted, a divided executive requires the executive officers to "combine and cooperate (even if they have differing policy views and perspectives) to provide an efficient and effective executive branch of government."[41] It may be that state governments traditionally have taken that duty seriously.

D. The Cases Addressing the Relative Powers of Governors and Attorneys General

Not all disputes between governors and attorneys general regarding their respective powers are resolved internally and some, not surprisingly, proceed to litigation. The relatively few cases addressing intra-executive branch disputes, however, are significant for our purposes in that they provide useful insight into the types of legal conflicts that can be triggered by a divided executive, how courts might approach these conflicts, and, by implication, whether a divided executive is a viable and sustainable structure.[42] These cases can be broken into three categories: (1) cases in which the Attorney General chooses to exercise independent legal judgment and either refuses to represent the Governor (or other executive officers or agencies) or takes an opposed position in litigation; (2) independent actions brought by the Attorney General directly against the Governor or other members of the executive; and (3) cases raising the issue of whether the Attorney General has the right to initiate enforcement actions against private parties without the Governor's approval or in direct contravention of the Governor's wishes. This Section first canvasses the cases within each category and then evaluates whether the approaches utilized by the courts are effective in furthering the purposes the divided executive is designed to achieve.

1. The Power of the Attorney General To Exercise Independent Legal Judgment in Litigation

The first and most common category of cases addresses the right of the Attorney General to refuse to take the Governor's (or other executive officer's *2456 or agency's) position in court. Must the Attorney General represent the position of the Governor on a disputed legal issue, or is she free to substitute her own independent legal judgment as to the best interests of the state? The majority rule favors attorney general independence.[43] Her primary duty, as the state's chief law officer, is to represent the public interest and not simply "the machinery of government."[44]

In Secretary of Administration & Finance v. Attorney General,[45] for example, the Massachusetts Supreme Court held that the Attorney General can refuse to appeal an adverse decision despite the contrary wishes of his executive agency client: "[W]hen an agency head recommends a course of action, the Attorney General must consider the ramifications of that action on the interests of the Commonwealth and the public generally, as well as on the official himself and his agency."[46] An Alabama case, Ex parte Weaver,[47] states this principle even more broadly:

> The most far-reaching of the attorney general's common-law powers is the authority to control litigation involving state and public interests. It is generally accepted that the attorney general is authorized to bring actions on the state's behalf. As the state's chief legal officer, the attorney-general has power, both under common law and by statute, to *2457 make any disposition of the state's litigation that he deems for its best interest.[48]

Not all states, to be sure, adopt this reasoning. In Manchin v. Browning,[49] the West Virginia Supreme Court granted a writ of mandamus requiring the Attorney General to represent the Secretary of State in federal court over the Attorney General's objection. The court noted that the Attorney General was in a traditional attorney-client relationship with other state executive officers and could not decline representation.[50] Thus, the Attorney General's authority to manage the litigation was limited to developing the case "so as to reflect and vindicate the lawful public policy of the officer he represent[ed]."[51]

In Santa Rita Mining Co. v. Department of Property Valuation,[52] the Attorney General appealed an adverse property tax judgment against the express wishes of his agency client. The defendants successfully petitioned for a special action to dismiss the pending court of appeals action; the Arizona Supreme Court held that the Attorney General lacked the authority to maintain the appeal without the approval of his agency client. The court concluded that the Governor alone was empowered to protect the public interest and ensure that the laws are faithfully executed.[53] Accordingly, the Attorney General was bound to represent the position of the executive branch and not his own views of the public interest in order to preserve the appropriate division of powers within the executive branch.

In one unusual case, the court found that the Governor and the Attorney General had concurrent powers. The underlying litigation in Perdue v. Baker[54] involved a challenge to the State of Georgia's reapportionment plan. A lower federal court held that the plan violated the Voting Rights Act. Before the appeals were completed, the Georgia legislature passed a back-up plan to implement if the courts continued to invalidate the original plan. Apparently *2458 favoring the back-up plan over the original, the Governor sued the Attorney General seeking to force him to drop his appeal to the U.S. Supreme Court. The Georgia Supreme Court rejected the Governor's petition. Explaining that its decision was based in part upon the policy of promoting a system of checks and balances between the two officers, the court held that both the Governor and the Attorney General were entitled to represent the state before the Georgia Supreme Court.[55]

2. The Power of the Attorney General To Sue the Governor or Other Executive Officers

The second category of cases comprises those in which the Attorney General sues the Governor or other executive officers. For example, an issue occasionally arises regarding the power of the Attorney General to challenge the constitutionality of a state enactment by suing the state executive charged with its enforcement,[56] including the Governor when appropriate.[57] In such cases, the majority rule vests power in the Attorney General to bring the action.[58] Thus, in People ex rel. Salazar v. Davidson,[59] a Democratic Attorney General contended that a redistricting plan signed by the Republican Governor violated the state constitution and sued the Secretary of State to invalidate the plan. The Colorado Supreme Court affirmed the Attorney General's prerogative, holding that "the Attorney General must consider the broader institutional concerns of the state even though [those] concerns [are] not shared by" other executive officers.[60]

Case law also supports the power of the Attorney General to sue the Governor over matters involving the Governor's own actions. In State ex rel. *2459 Condon v. Hodges,[61] the South Carolina Supreme Court allowed the Attorney General to sue the Governor for attempting to circumvent the provisions of an appropriations bill. Rejecting the argument that a lawyer cannot sue his own client, the court held that the Attorney General has a dual role as the Governor's attorney and as the executive official charged with vindicating wrongs against the citizens of the state, with the power to seek legal redress for separation-of-powers violations by other state executive officers.[62]

Although there are few cases in which the Attorney General directly sues the Governor, Hodges is not the only example. The Mississippi Supreme Court has allowed the Attorney General to intervene on behalf of plaintiff legislators seeking to declare that a Governor's partial vetoes of certain bills were unconstitutional.[63] The Kentucky Supreme Court, although holding that the Attorney General had not justified his claim for injunctive relief on the merits, allowed him to bring an action to enjoin the Governor from being sworn in and acting as a member of the state university board of trustees pursuant to the Governor's own self-appointment.[64] And the Florida Supreme Court allowed the Attorney General to bring a quo warranto action against the Lieutenant Governor seeking his removal because he lacked necessary qualifications.[65]

Nevertheless, the right of the Attorney General to sue executive branch officers or agencies has not been universally approved. In Arizona State Land Department v. McFate,[66] for example, the Arizona Supreme Court held that the Attorney General could not bring suit against a state agency to enjoin its sale of public lands. The court explained that "the Governor alone, and not the Attorney General, is responsible for the supervision of the executive department and is obligated and empowered to protect the interests of the *2460 people and the State."[67] Similarly, in Hill v. Texas Water Quality Board,[68] the Texas Court of Civil Appeals held that the Attorney General lacked the authority to bring suit to set aside an agency rule, finding no independent authority for the Attorney General to represent the public interest against the specific interests of his agency client.

3. The Power of the Attorney General To Initiate Enforcement Actions Against Private Parties

The final category of cases concerns the power of the Attorney General to proactively initiate civil or criminal actions against private parties. This power, needless to say, may have a profound effect on a state's policy agenda. For example, a governor who promises to create a pro-business climate could be hampered in achieving this result if the state's attorney general is aggressive in maintaining consumer protection or antitrust actions against the state's industries. Similarly, a governor who runs for office as an anti-pornography crusader will be seriously limited in his ability to deliver on this issue if the state's attorney general refuses to bring pornography prosecutions.

Whether the State Attorney General has the power to initiate criminal or civil actions independent of the Governor is largely

a function of statutory authority and, particularly in civil matters, whether the Attorney General is deemed to enjoy common law powers. Thus, in Ohio v. United Transportation, Inc.,[69] the court held that, because he had common law authority, the Attorney General of Ohio could bring an antitrust action under state and federal law against local taxicab companies without the approval of either the Governor or the General Assembly.[70] The court stated that "the broad inherent common law powers of the attorney general in . . . contesting infringements of the rights of the general public" had been long recognized.[71] This common law power, moreover, is quite broad. As the court held in Florida ex rel. Shevin v. Exxon *2461 Corp.,[72] the Attorney General is entrusted, under the common law, with "wide discretion" and a "significant degree of autonomy" in determining what is in the public interest.[73] Indeed, the Attorney General's common law authority is so unfettered that it may allow her to bring suits in the public interest even when other executive officers or agencies oppose such actions.[74]

In other states, however, the courts have held that the Attorney General's powers are far more circumscribed. In State ex rel. Haskell v. Huston,[75] for example, the Oklahoma Supreme Court held that the Attorney General must have the Governor's permission to maintain a civil nuisance action against an oil company because it is within the Governor's responsibility to see that the laws are "faithfully administered."[76] Moreover, in a few states, not only is the Attorney General prohibited from initiating actions without the Governor's approval, but the Governor can also compel the Attorney General to prosecute an action even when the Attorney General does not want to proceed.

4. The Cases in Theoretical Perspective

Some of the results in the cases reviewed in the previous Subsections can be explained simply as the product of statutory interpretation by the courts. The McFate decision, for example, was based on the relatively broad powers accorded to the Governor under the Arizona Constitution compared to the narrow grant of authority vested in the Attorney General.[77] In other cases, such as Shevin, when the constitutional and statutory principles were less explicit, the courts had to rely on more general principles.[78]

*2462 But whether derived from constitutional provision, statutory text, or judicial gloss, two general approaches have emerged in deciding how the powers of the Governor and the Attorney General are to be allocated in a divided executive. The first, based on ethics, suggests that the conflicts should be resolved in accord with the principles of the attorney-client relationship. The second, based on the structure of the divided executive, looks to the policies and understandings underlying that model as the basis for resolution. Each will be discussed in turn.

a. The Argument from Ethics

The leading case in support of the position that an attorney general is bound by the principles of the attorney-client relationship to represent the interests of his state officer or agency client is People ex rel. Deukmejian v. Brown.[79] As the California Supreme Court stated in that case, there is nothing unique to the duties of the Attorney General that "justif[ies] relaxation of the prevailing rules governing an attorney's right to assume a position adverse to his clients or former clients."[80] The approach taken in Deukmejian has an initial, intuitive attraction. After all, if the Attorney General is the lawyer and the Governor the client, the normal expectation would be that the former should advance the latter's legal positions.[81] In fact, however, the attorney-client relationship approach is easily dismissed.[82]

To begin with, this approach ignores the fact that the Attorney General's role is significantly more complex than that of a private attorney. Since seventeenth-century England, the Attorney General has generally been deemed to represent the "state" or public interest and not only the machineries of government.[83] Moreover, in the modern era of expansive government, the Attorney General is also often charged with representing a wide range of state *2463 officers and agencies, many of whom have positions diametrically opposed to each other. Accordingly, and in recognition of this reality, most courts have held that an attorney general does not violate ethical rules when she engages in the dual representation of competing state entities.[84] It is therefore not a giant step to conclude that dual representation of a state entity and the state or public interest is also not an ethical violation and, indeed, a majority of jurisdictions have so held.[85]

Furthermore, the nature of an independent attorney general belies the conclusion that an attorney general should be ethically bound to represent her officer client. Ethical rules do not provide an attorney with much room to reject the position of her client[86] and, if they in fact limited her authority, there would be little reason for an attorney general to have independent status. Certainly, an attorney general, ethically bound to represent a governor, would not serve as a check on a governor who

was intent on exceeding his constitutional or statutory authority. At best, she would be able only to refuse to facilitate the governor's actions.[87]

Finally, ethical concerns also weigh against binding an attorney general by the attorney-client relationship. As the Colorado Supreme Court noted in People ex rel. Salazar v. Davidson,[88] imposing a rigid obligation on the Attorney General to advance the executive's positions can undermine the Attorney General's ethical obligations to uphold the law and constitution when the ***2464** Governor seeks to defend a measure that the Attorney General believes is unlawful.[89]

b. The Argument from Structure

The structural approach to disputes between the Governor and the Attorney General focuses on the respective roles of the two officers in the divided executive and questions which role deserves particular deference in a specific context. In certain circumstances, specifically with respect to policy judgments, a structural analysis supports the authority of the Governor (or other executive officer or agency) over that of the Attorney General. Consider Motor Club of Iowa v. Department of Transportation of Iowa,[90] in which a motor club challenged the validity of a state agency rule establishing a sixty-five foot length limitation for trucks.[91] After losing in the trial court, the agency decided against an appeal because a majority of agency commissioners no longer supported the length limit. The Attorney General, however, attempted to pursue the appeal without agency approval. The court held that the Attorney General did not have the authority to proceed without agency authorization.

From a structural perspective the decision makes sense. After all, if the agency no longer supports its own rule, why should the Attorney General, the chief legal officer, be able to substitute her policy judgment for that of the entity empowered to make the policy decisions?[92] Similarly, if the Governor is the officer charged with setting state policy, it makes sense that the Attorney General should defer to the Governor's (non-legal) policy judgments.

The structural argument, however, favors the Attorney General in matters involving legal, as opposed to policy, judgments.[93] Presumably, a primary reason for having an independent attorney general is to allow for independent legal judgment. Empowering the Governor to be the final authority on legal decisions would make this independence a nullity (as well as, nonsensically ***2465** enough, vesting in a non-legal officer the power to have the final say on legal meaning).[94]

To be sure, the line between legal judgment and policy decision is sometimes blurred. (Some might even suggest that all law is policy-based.[95]) But even if all legal decisions have some policy overtones, as Motor Club of Iowa suggests, not all policy decisions involve law. The truly difficult cases, in this respect, are those in the third category discussed in this Section, dealing with the Attorney General's power to institute lawsuits against private parties on behalf of the state. No doubt the decision to bring cases such as the antitrust action in United Transportation[96] or the civil nuisance action in Haskell[97] involves the exercise of legal judgment. But it also involves non-legal considerations that can be integral to a state's overall policy agenda. Accordingly, whether final authority for such decisions should be deemed to be in the province of the Governor, the Attorney General, or both, may depend on the particular context, or, as is often the case with statutory enforcement matters, legislative intent.

The structural argument more consistently favors the Attorney General in the first category of cases previously discussed, those concerning the power of the Office to refuse to take the position of executive branch officers or agencies in ongoing litigation. First, assuming the Attorney General's actions are based upon legal, rather than policy, judgments, her authority to refuse to take the executive branch client's position reflects her structural role as the state's chief legal officer. Second, recognizing her prerogatives in this respect also furthers the policy of having an executive officer whose fealty extends primarily to the rule of law rather than to the litigation needs of any particular administration.[98] Third, allowing the Attorney General to oppose the Governor or other executive branch officer in court reflects another benefit of the divided executive--it promotes a fuller and more thorough examination of intra- ***2466** executive disputes, both in court and in pre-litigation consultation, than would occur if the Governor were empowered to impose his position unilaterally.[99] Indeed, the values of intrabranch litigation have been implicitly recognized even within the federal executive in cases like United States v. Nixon[100] and Tennessee Valley Authority v. United States EPA,[101] where courts have refused to dismiss intrabranch litigation as non-justiciable on grounds that the requisite adversarial component was missing when the U.S. government was effectively suing itself.[102] Rather, the courts heard both sides of the issues involved, presumably reaching a more considered judgment than might have occurred if the matters had been decided entirely within the executive branch.[103] The results in state cases

Office from over-retaliation.[145] Finally, whether the position is elected or appointed, steps should be taken to assure that the Office's ability to function effectively is not undermined by politicization.[146]

No solution is likely to be free of difficulty, and designing the optimum approach will take some development and empirical study that are beyond the bounds of this Essay. The critical question, however, is not whether the creation of an independent Federal Attorney General would be a perfect solution but whether it would be preferable to the current model in which the Attorney General is politically dependent on and subservient to the President. The workability of the state experience with independent attorneys general provides a starting point for assessing the viability and desirability of this option as a method for restraining presidential power. The increasing inability of the current federal system to check presidential excesses provides reason to consider this approach seriously.

CONCLUSION

The debate over the unitary executive has tended to disregard the state experience, although virtually every state government has a divided executive structure. As the state experience demonstrates, a divided executive presents its share of concerns. Proponents of the unitary executive correctly point out that the structure can impose inefficiency and coordination costs. But the structure offers benefits as well. State attorneys general who are not under the control of governors are freer to offer objective advice and better able to act in accordance with the rule of law rather than in the pursuit of a particular political agenda. An independent attorney general's ability to do so without imposing substantial burdens on the efficacy of state government makes the model an attractive candidate for adoption at the federal level. The current presidency has the potential of becoming a law unto itself as the expediency and demands of modern government have, in some critical areas, freed the President from the effective oversight of the other two branches. At the same time, the President's ability to control the Office of the Attorney General makes him effectively the only arbiter of the legality of his actions. An independent attorney general, in the form of the state divided executive, may therefore be an ***2479** appropriate model from which to reconstruct a workable system of intrabranch checks and balances.

Footnotes

a1 AUTHOR. William R. Kenan Distinguished Professor of Law, University of North Carolina at Chapel Hill. I am grateful to Elizabeth Ferrill and Tyler Tarrant for their research assistance. I would also like to thank Hal Krent, Jim Tierney, and (especially) Kara Millonzi for their helpful comments and suggestions.

1 Steven G. Calabresi, Some Normative Arguments for the Unitary Executive, 48 Ark. L. Rev. 23, 25 (1995).

2 Patrick C. McGinley, Separation of Powers, State Constitutions & the Attorney General: Who Represents the State?, 99 W. Va. L. Rev. 721, 722 (1997).

3 The Attorney General is independently elected in forty-three states and is appointed by the legislature in Maine and the Supreme Court in Tennessee. Council of State Gov'ts, The Book of the States 268 (2005). In New Jersey, New Hampshire, and Hawaii, the Attorney General is appointed by the Governor but is not removable at will. See Haw. Const. art V, § 6; N.H. Const. pt. 2, arts. 46, 47, 73; N.J. Const. art. V, § IV, paras. 3, 5. Only in Alaska and Wyoming does the Attorney General serve entirely at the Governor's behest. See Alaska Const. art. III, § 25; Wyo. Stat. Ann. § 9-1-601 (2005).

4 See Daniel R. Grant & Lloyd B. Omdahl, State and Local Government in America (5th ed. 1986).

5 This Essay assumes, for purposes of discussion, that making the Office of the Attorney General independent, either by election or appointment, would require a constitutional amendment. See Proposals Regarding an Independent Attorney General, 1 Op. Off. Legal Counsel 75, 77-78 (1977).

6 6 William Holdsworth, A History of English Law 459 (2d ed. 1937).

7 Id.

8 Id. at 460-61.

9 Id.

10 Rita W. Cooley, Predecessors of the Federal Attorney General: The Attorney General in England and the American Colonies, 2 Am. J. Legal Hist. 304, 307 (1958).

11 6 Holdsworth, supra note 6, at 463.

12 Id. at 465.

13 Cooley, supra note 10, at 307.

14 12 William Holdsworth, A History of English Law 305 (1st ed. 1938).

15 Id.

16 Nat'l Ass'n of State Attorneys Gen., State Attorneys General: Powers and Responsibilities 6 (Lynne M. Ross ed., 1990) [hereinafter State Attorneys General].

17 Daniel J. Meador, The President, the Attorney General, and the Department of Justice 5 (1980). Notably, the Crown granted colonial attorneys general the same powers and duties as the attorneys general had at home. The effectiveness of the colonial attorneys general, however, was far more limited than their English counterparts owing to their significant lack of resources. State Attorneys General, supra note 16, at 6.

18 See generally Oliver W. Hammonds, The Attorney General in American Colonies, in 2 Anglo-American Legal History Series, ser. 1, 3 (Paul M. Hamlin ed., New York Univ. Sch. of Law 1939).

19 N.C. Const. of 1776, art. XIII.

20 N.Y. Const. of 1777, arts. XXIII, XXXIII.

21 Del. Const. of 1776.

22 This practice dated back to 1650. See R.I. Sec'y of State, Office of the Attorney General, http://www.state.ri.us/govtracker/index.php? page=DetailDeptAgency&eid=3877 (last visited Aug. 5, 2006). The Office of the Attorney General was formally established by constitutional provision in 1842. R.I. Const. of 1842, art. VIII, § 1.

23 As will be discussed subsequently, it is somewhat ambiguous whether the Office was originally intended to be subject to presidential control. See infra notes 126-127 and accompanying text.

24 The question of whether Congress could create officers or agencies not subject to presidential control has been, of course, the dominant issue in the unitary executive debate. See, e.g., Steven G. Calabresi & Saikrishna B. Prakash, The President's Power To Execute the Laws, 104 Yale L.J. 541 (1994); Lawrence Lessig & Cass R. Sunstein, The President and the Administration, 94 Colum. L. Rev. 1, 5 (1994).

25 Steven H. Steinglass & Gino J. Scarselli, The Ohio State Constitution: A Reference Guide 163 (2004). Interestingly, the Attorney General was not one of the executive officers established in Ohio's first constitution and was created first by statute in 1848 and then by constitutional provision in 1851. Id. at 163-64.

26 State ex rel. Mattson v. Kiedrowski, 391 N.W.2d 777, 782 (Minn. 1986).

27 See supra note 3.

28 Scott M. Matheson, Jr., Constitutional Status and Role of the State Attorney General, 6 U. Fla. J.L. & Pub. Pol'y 1, 28 (1993).

29 The authority of attorneys general in specific subject areas is catalogued in State Attorneys General, supra note 16.

30 Id. at 278-79.

31 See, e.g., In re Cardizem CD Antitrust Litig., 218 F.R.D. 508, 521 (E.D. Mich. 2003) (describing variations in the common law powers of attorneys general across states). Not every state, however, invests the Attorney General with such authority. See, e.g., Blumenthal v. Barnes, 804 A.2d 152, 165 (Conn. 2002) (holding that the Connecticut Attorney General does not have common law powers).

32 See, e.g., Ariz. Rev. Stat. Ann. § 41-192(A) (2006); Colo. Rev. Stat. § 38-13-102(2.5) (2005); Ga. Code Ann. § 45-15-10 (2006); Miss. Code Ann. § 7-5-1 (2006); see also State Attorneys General, supra note 16, at 40.

33 See, e.g., Ill. Const., art. 5, § 8 ("The Governor shall have the supreme executive power, and shall be responsible for the faithful execution of the laws."); Mont. Const. art. 6, § 4 (same); Pa. Const. art. 4, § 2 (same).

34 Thad L. Beyle, Governors, in Politics in the American States 180, 192 (Virginia Gray et al. eds., 4th ed. 1983) ("These two offices [the Governor and the Attorney General] ... have the potential for built-in conflict at several levels, from politics to policy to administration.").

35 See, e.g., Al Baker, Pataki, Environmentalist? Little and Late, Critics Say, N.Y. Times, Feb. 18, 2003, at B2.

36 See William N. Thompson, Should We Elect or Appoint State Government Executives? Some New Data Concerning State Attorneys General, 8 Midwest Rev. Pub. Admin. 17, 29-31 (1974).

37 See Matheson, supra note 28, at 12 & n.57 (1993) (citing the articles of two state attorneys general, William A. Saxbe, Functions of the Office of Attorney General of Ohio, 6 Clev.-Marshall L. Rev. 331, 334 (1957), and Lacy H. Thornburg, Changes in the State's Law Firm: The Powers, Duties and Operations of the Office of the Attorney General, 12 Campbell L. Rev. 343, 359 (1990)).

38 See, e.g., id. at 28 n.148.

39 James E. Tierney, The State Attorney General: Who Is the Client? (Sept. 1, 1995),http://c-128.port5.com/articles/art2.html.

40 Id.

41 State ex rel. McGraw v. Burton, 569 S.E.2d 99, 109 (W. Va. 2002) (emphasis added).

42 The cases may also have implicit significance in that the very fact that courts have been able to entertain intrabranch disputes reinforces the viability of the divided executive by suggesting that an effective judicial backstop may be available to resolve any potentially debilitating conflicts.

43 Manchin v. Browning, 296 S.E.2d 909, 923 (W. Va. 1982) (Neely, J., dissenting) (urging that the rule in the majority of jurisdictions be adopted by the court).

44 Commonwealth ex rel. Hancock v. Paxton, 516 S.W.2d 865, 867 (Ky. 1974); see also id. at 868 ("[I]n case of a conflict of duties the Attorney General's primary obligation is to the Commonwealth, the body politic, rather than to its officers, departments, commissions, or agencies."). The Hancock court noted that at common law the Attorney General represented the king, "he being the embodiment of the state. But under the democratic form of government now prevailing the people are the king ...." Id. at 867 (internal citation omitted); see also Sandersen v. Blue Cross & Blue Shield of Ala. (Ex parte Weaver), 570 So. 2d 675, 684 (Ala. 1990) (holding that the Attorney General had the authority to dismiss legal proceedings over the objection of an executive agency).

45 326 N.E.2d 334 (Mass. 1975).

46 Id. at 338. Two years later, in Feeney v. Commonwealth, 366 N.E.2d 1262, 1266-67 (Mass. 1977), the Massachusetts Supreme Court came to the same result when the parties' intentions were reversed, holding that the Attorney General could prosecute an appeal even when his executive agency client objected.

47 570 So. 2d 675.

48 Id. at 677 (internal citations and quotations omitted). Ex parte Weaver also suggests that the Attorney General should allow the state agency to employ counsel to represent its position if the Attorney General refuses to do so. Id. at 678-79.

49 296 S.E.2d 909, 921 (W. Va. 1982). The Manchin court did acknowledge, however, that its decision did not follow the majority rule. Id. at 921 n.6.

50 Id. at 919-21; see also Chun v. Bd. of Trs., 952 P.2d 1215, 1234 (Haw. 1998) (holding that when the Attorney General's views differ from those of her agency client, the Attorney General cannot control the litigation "as to advance her view of the 'public welfare"').

51 Manchin, 296 S.E.2d at 921.

52 530 P.2d 360 (Ariz. 1975).

53 Id. at 362 (citing Ariz. State Land Dep't v. McFate, 348 P.2d 912 (Ariz. 1960)).

54 586 S.E.2d 606 (Ga. 2003).

55 Id. at 610.

56 See, e.g., Commonwealth ex rel. Hancock v. Paxton, 516 S.W.2d 865, 867-68 (Ky. 1974) ("[T]he duty of the Attorney General to uphold the Constitution ... surely embraces the power to protect it from attacks in the form of legislation as well as from attacks by way of lawsuits by other persons against state officers or agencies.").

57 Cf. State ex rel. Douglas v. Thone, 286 N.W.2d 249 (Neb. 1979) (allowing, without discussion, the Attorney General to bring an action against the Governor to enjoin the implementation of a statute).

58 Hansen v. Barlow, 456 P.2d 177, 177-78 (Utah 1969). But cf. State v. Burning Tree Club, 481 A.2d 785 (Md. 1984) (holding that the Maryland Attorney General does not have common law, statutory, or state constitutional authority to initiate a declaratory judgment action challenging the constitutionality of a state statute).

59 79 P.3d 1221 (Colo. 2003).

60 Id. at 1231.

61 562 S.E.2d 623 (S.C. 2002).

62 Id. at 627-28.

63 Fordice v. Bryan, 651 So. 2d 998 (Miss. 1995). Even more recently, the Mississippi Attorney General sued to block the Governor's cut-back on Medicaid. See James Dao, In Mississippi, Setting the Pace for a New Generation of Republican Governors, N.Y. Times, Feb. 8, 2005, at A18.

64 Commonwealth ex rel. Cowan v. Wilkinson, 828 S.W.2d 610 (Ky. 1992).

65 State ex rel. Attorney-General v. Gleason, 12 Fla. 190 (1868); cf. United States v. Troutman, 814 F.2d 1428, 1438 (10th Cir. 1987) (holding that it was proper for the Attorney General to assist federal officials in the prosecution of an executive officer because "a state attorney general has a primary responsibility to protect the interests of the people of the state and must be free to prosecute violations of those interests by a state officer regardless of his representation of the state officer in past or pending litigation").

66 348 P.2d 912 (Ariz. 1960).

67 Id. at 918. See also Ariz. Const. art. V, §§ 1, 4 (charging the Governor with the faithful execution of the laws and stating that the duties of the Attorney General shall be as prescribed by law).

68 568 S.W.2d 738 (Tex. Civ. App. 1978).

69 506 F. Supp. 1278 (S.D. Ohio 1981).

70 Id.; see also Florida ex rel. Shevin v. Exxon Corp., 526 F.2d 266 (5th Cir. 1976) (affirming the power of the Attorney General to maintain an antitrust suit against various oil companies).

71 United Transp., 506 F. Supp. at 1281-82; see also In re Cardizem CD Antitrust Litig., 218 F.R.D. 508, 520-21 (E.D. Mich. 2003) ("Plaintiff States, by their Attorneys General, had the authority to settle and release indirect purchaser claims in a parens patriae or other representative capacity.").

72 526 F.2d at 266.

73 Id. at 268-69, 271.

74 See id. at 272; see also State v. Tex. Co., 7 So. 2d 161, 162 (La. 1942) (holding that the Attorney General "is not required to obtain the permission of the Governor or any other executive or administrative officer or board in order to exercise" his right to sue on behalf of the state); State ex rel. Bd. of Transp. v. Fremont, E. & M.V.R. Co., 35 N.W. 118, 120 (Neb. 1887) (holding that the Attorney General could proceed with the prosecution of a case over the objections of the executive agency involved in the suit).

75 97 P. 982 (Okla. 1908).

76 Id. at 985-87 (concluding that the Governor has the sole and exclusive right to exercise executive discretion to determine if a suit should be brought on behalf of the state, and that the Attorney General cannot interfere with the Governor's discretion); see also State ex rel. Cartwright v. Ga.-Pac. Corp., 663 P.2d 718 (Okla. 1982) (noting that the Attorney General must seek the Governor's permission to initiate a suit).

77 Ariz. State Land Dep't v. McFate, 348 P.2d 912, 912 (Ariz. 1960).

78 526 F.2d at 266.

79 624 P.2d 1206 (Cal. 1981). Deukmejian, although the leading case in support of this position, is actually somewhat unusual in that the Attorney General had previously counseled the state agency about how to implement the law at issue.

80 Id. at 1209; see also Tice v. Dep't of Transp., 312 S.E.2d 241, 246 (N.C. Ct. App. 1984) (holding that the Attorney General is bound by rules governing the attorney-client relationship); Manchin v. Browning, 296 S.E.2d 909, 920 (W. Va. 1982) (same).

81 See Bill Aleshire, Note, The Texas Attorney General: Attorney or General?, 20 Rev. Litig. 187 (2000).

82 For a thoughtful discussion of the ethical issues involved, see Justin G. Davids, State Attorneys General and the Client-Attorney Relationship: Establishing the Power To Sue State Officers, 38 Colum. J.L. & Soc. Probs. 365 (2005).

83 See supra notes 14-16 and accompanying text.

84 E.g., Conn. Comm'n on Special Revenue v. Conn. Freedom of Info. Comm'n, 387 A.2d 533 (Conn. 1978); People ex rel. Sklodowski v. State, 642 N.E.2d 1180 (Ill. 1994); Pub. Util. Comm'n v. Cofer, 754 S.W.2d 121 (Tex. 1988).

85 E.g., People ex rel. Salazar v. Davidson, 79 P.3d 1221 (Colo. 2003); EPA v. Pollution Control Bd., 372 N.E.2d 50 (Ill. 1977); Commonwealth ex rel. Hancock v. Paxton, 516 S.W.2d 865 (Ky. Ct. App. 1974); Humphrey ex rel. State v. McLaren, 402 N.W.2d 535 (Minn. 1987); State ex rel. Allain v. Miss. Pub. Serv. Comm'n, 418 So. 2d 779 (Miss. 1982). But see Deukmejian, 624 P.2d at 1206; City of York v. Pa. Pub. Util. Comm'n, 295 A.2d 825 (Pa. 1972).

86 See, e.g., Ohio Code of Prof'l Responsibility EC 5-1 (2004) ("The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties."); see also Model Rules of Prof'l Conduct R. 1.2 (2004).

87 Manchin v. Browning, 296 S.E.2d 909, 923 (W. Va. 1982) (Neely, J., dissenting) (arguing that defining the Attorney General's role with reference to the attorney-client relationship renders the Attorney General "analogous to a legal aid attorney for State employees sued in their official capacity ... [who is] bound to advocate zealously the personal opinions of the officer whom he represents").

88 79 P.3d 1221, 1231 (Colo. 2003).

89 For a discussion of the Attorney General's obligations to refuse to defend unconstitutional laws, see Dawn E. Johnsen, Presidential Non-Enforcement of Constitutionally Objectionable Statutes, Law & Contemp. Probs., Winter/Spring 2000, at 7; and Seth P. Waxman, Defending Congress, 79 N.C. L. Rev. 1073, 1088 (2001).

90 251 N.W.2d 510 (Iowa 1977).

91 Id. at 512.

92 Id. at 516.

93 Affording the Attorney General the power to exercise independent legal judgment (e.g., to provide the Governor with an interpretation of the meaning of a law) is not necessarily inconsistent with the Governor's duty to assure that the laws are faithfully executed.

94 See Manchin v. Browning, 296 S.E.2d 909, 924 (W. Va. 1982) (Neely, J., dissenting) ("To take the control of the State's case away from the 'chief "law-trained" officer of the State' and inject the opinions of [an executive] officer who has no legal training is nonsensical.").

95 Cf. Lawrence M. Friedman, American Law in the 20th Century 589 (2002) (observing that all lawyers and judges are at times legal realists).

96 Ohio v. United Transp., Inc., 506 F. Supp. 1278 (S.D. Ohio 1981); see also supra notes 69-71 and accompanying text.

97 State ex rel. Haskell v. Huston, 97 P. 982 (Okla. 1908); see also supra notes 75-76 and accompanying text.

98 See generally Lincoln Caplan, The Tenth Justice: The Solicitor General and the Rule of Law 277 (1987) (describing the Solicitor General's Office as independently committed to the rule of law).

99 For this reason, the common rule that the Governor may retain separate counsel when the Attorney General refuses to take his position also makes sense. See, e.g., Ex parte Weaver, 570 So. 2d 675 (Ala. 1990) (allowing the Governor to intervene and take a

position in opposition to the Attorney General).

100 418 U.S. 683 (1974).

101 278 F.3d 1184 (11th Cir. 2002), opinion withdrawn in part sub nom. Tenn. Valley Auth. v. Whitman, 336 F.3d 1236 (11th Cir.2003).

102 Id. at 1197.

103 As Neal Devins reports, the Supreme Court, in furtherance of its interest in fully hearing an issue, has occasionally chided the Solicitor General for not reporting intrabranch disputes. See Neal Devins, Unitariness and Independence: Solicitor General Control over Independent Agency Litigation, 82 Cal. L. Rev. 255, 315-16 (1994).

104 See supra notes 25-27 and accompanying text.

105 She may also, because of the traditions of her office, have greater insulation from political pressure because of her perceived role in upholding the rule of law, although one would think that this perception might vary widely among specific personalities.

106 This is not to say that politics will never play a role in an attorney general's decisions. It is undoubtedly no accident that the legal positions of Attorneys General Salazar and Baker in their respective redistricting and reapportionment cases reflected the positions of their political party. See People ex rel. Salazar v. Davidson, 79 P.3d 1221 (Colo. 2003); Perdue v. Baker, 586 S.E.2d 606 (Ga. 2003).

107 562 S.E.2d 623 (S.C. 2002).

108 See People ex rel. Deukmejian v. Brown, 624 P.2d 1206, 1212 (Cal. 1981) (Richardson, J., dissenting) (noting that allowing the Governor to prohibit the Attorney General from seeking a judicial pronouncement on the legality of legislation that the Governor would implement would cause the "system of checks and balances envisioned by the Constitution [to] fail").

109 See, e.g., State ex rel. Mattson v. Kiedrowski, 391 N.W.2d 777, 782 (Minn. 1986) (holding that the legislature may not strip a constitutionally established, independent, executive officer of her independent core functions because to do so would "thwart" the Framers' intent to divide executive powers).

110 See Condon, 562 S.E.2d at 623 (holding that the South Carolina Attorney General can sue the Governor for appropriations violations).

111 See supra notes 101-103 and accompanying text; see also Abner S. Greene, Checks and Balances in an Era of Presidential Lawmaking, 61 U. Chi. L. Rev. 123, 134 (1994) ("Diversifying the voices heard in government not only helps to prevent one point of view from becoming too strong, but also promotes the affirmative goal of democratizing governmental decision-making."). Involving more than one actor in the decision-making process, as the divided executive requires, also can improve transparency which, in turn, can help improve the democratic process by informing the electorate as to the bases of executive branch actions. See Erik Luna, Transparent Policing, 85 Iowa L. Rev. 1107 (2000).

112 Iowa appears to be one state that has adopted this approach. Compare Motor Club of Iowa v. Dep't of Transp., 251 N.W.2d 510 (Iowa 1977) (holding that the Attorney General does not have the power to supersede the policy decision of a state agency in pursuing an appeal), with Fisher v. Iowa Bd. of Optometry Exam'rs, 476 N.W.2d 48 (Iowa 1991) (holding that the Attorney General has the authority to guide state litigation consistent with what he believes are the interests of justice).